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**A TREATISE**  
**ON**  
**THE LAW**  
**OF**  
**PUBLIC OFFICES AND OFFICERS**

**BY**  
**FLOYD R. MECHEM**  
**AUTHOR OF "A TREATISE ON THE LAW OF AGENCY"**

**CHICAGO**  
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TO THE  
HON. FRANK A. HOOKER

JUDGE OF THE FIFTH JUDICIAL CIRCUIT  
OF MICHIGAN

AN ABLE JUDGE, AN HONEST MAN AND A  
VALUED FRIEND

THIS VOLUME IS RESPECTFULLY DEDICATED

not alone as a token of his great public worth,  
but also in grateful remembrance of his  
continued kindness, encourage-  
ment and friendship to  
the writer





## PREFACE.

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The exceedingly kind reception given to the writer's previous work upon the law of Agency has encouraged him to offer also the following, which is, in some respects, a companion volume to the other.

While engaged upon the other work, the writer was constantly impressed with the great number of important questions, similar to those he was then considering, but relating to the law of public agents or officers, and which had never been fully treated. A few of them had, it is true, been made the subject of special treatises, such as the subjects of elections, sheriffs, official bonds, and the application of extraordinary remedies like mandamus, quo warranto and injunction. A few others had been incidentally considered in relation to other subjects. There was still, however, a large class of important questions which had never been specially considered in any treatise, and no attempt had ever been made by any author, English or American, so far as the writer is aware, to give a connected and continuous discussion of the whole subject. There seemed to him, therefore, to be a real need for such a book, and he has attempted to supply it.

He has endeavored to begin at the beginning, showing what are public offices and who are public officers, and to give in consecutive chapters a view of the whole field, showing who are eligible to public office; how they may be elected or appointed, and qualified; how they may surrender, abandon or forfeit their rights and authorities; what authority they possess; how they should execute it; what liabilities attach to their acts; what rights they possess and what rights are possessed by the public; and finally by what remedies their duties and liabilities may be enforced.

The work is divided into five parts or books, and each book is subdivided into consecutive chapters. The arrangement adopted

may not be the best possible, but it seemed to the writer to be convenient and reasonably adapted to the purpose in view. No little difficulty has been experienced in determining the proper limits to be fixed to the work, and it may be that others would not agree with those upon which the writer has finally determined.

In a few cases the subject has run so closely parallel to that of agency, that the writer has reproduced a few sections from his work upon that subject, while the chapters upon the liability of public officers to private actions are an enlargement of the sections devoted to that subject in the former work. With these exceptions, the contents of this work are entirely new.

In this work the writer has pursued the plan, which has been generally approved in the other, of giving in the text or notes quite full illustrations and quotations from leading and characteristic cases upon the subject. He has also added parallel references to the American Decisions, American Reports, and American State Reports, as well as to the various Reporters. Particular attention has been given to the latest cases, and these, it is believed, have been quite fully cited.

In treating certain of the special questions, the writer has derived much assistance from the previous labors of those who have devoted treatises to what he has been compelled to compress into chapters, and to such treatises the reader must be referred for fuller discussions. These are particularly Judge McCRAE's standard work upon Elections, Mr. HIGH's excellent treatise upon Extraordinary Legal Remedies, and Judge COOLEY's valuable work on Torts.

The writer desires also to acknowledge his indebtedness to his publishers, Messrs. Callaghan & Co., of Chicago, who, in this instance as in the former, have spared no pains that the book might not fail for want of proper mechanical execution, and who have treated the writer with uniform courtesy and consideration.

Hoping, therefore, that this volume may be found not less worthy than the other of the generous judgment of the profession, the writer submits it to their consideration.

FLOYD R. MECHEM.

DETROIT, December 1, 1889.

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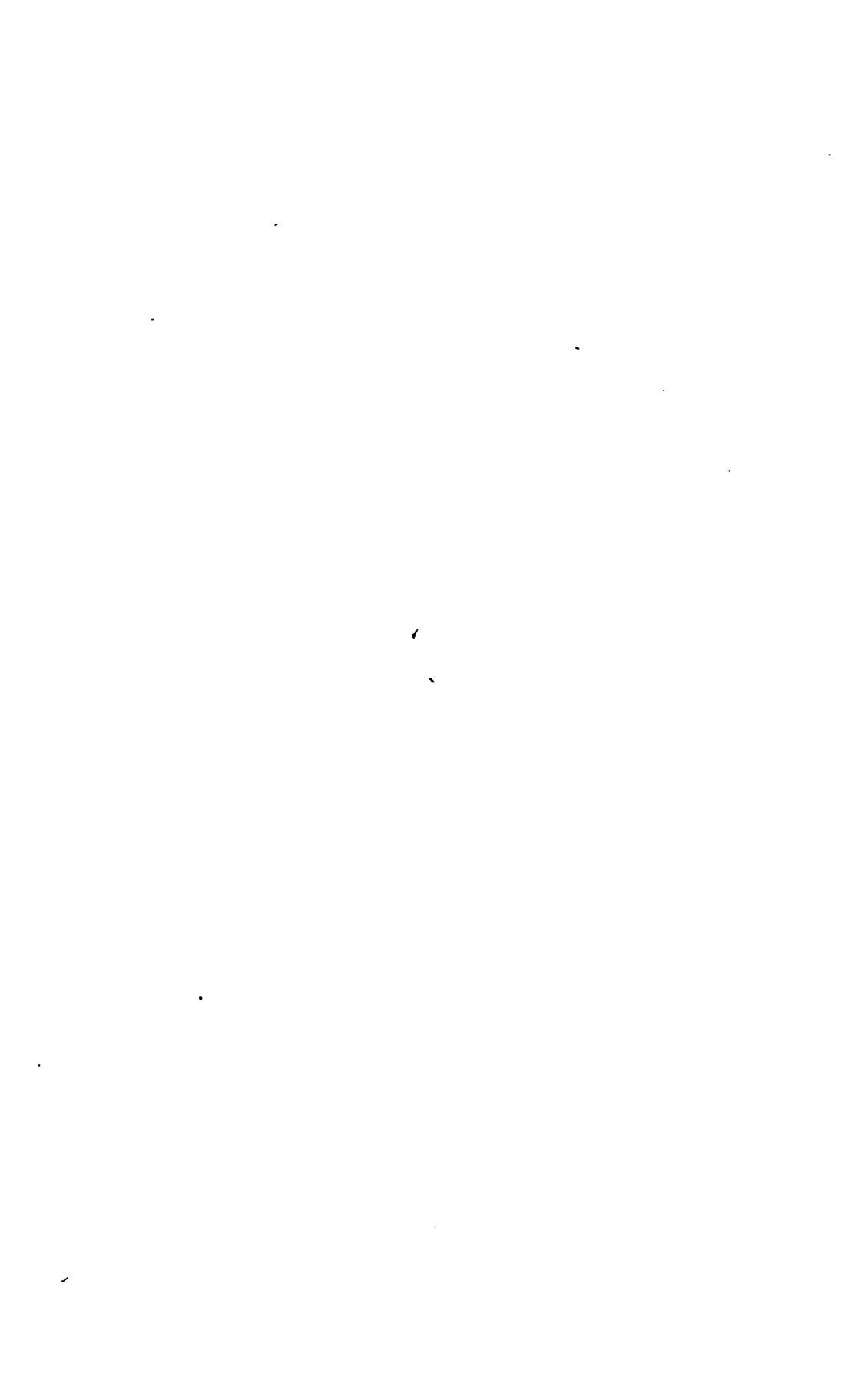
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**THE LAW**  
**OF**  
**PUBLIC OFFICES AND OFFICERS.**



THE LAW  
OF  
PUBLIC OFFICES AND OFFICERS.

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BOOK I.  
OF THE OFFICE AND THE OFFICER; HOW OFFICER  
CHOSEN AND QUALIFIED.

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CHAPTER I.  
DEFINITIONS AND DIVISIONS.

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|---|--|
| <p>§ 1. Public Office and Officer defined.</p> <p>2. How Office differs from Employment.</p> <p>3. Office differs from a Contract.</p> <p>4. Office involves Delegation of sovereign Functions.</p> <p>5. Office is created by Law and not by Contract.</p> <p>6. Oath a usual but not a necessary Criterion.</p> <p>7. Salary or Fees not a necessary Criterion.</p> <p>8. Duration or Continuance as Criterion.</p> <p>9. Scope of Duties as a Criterion.</p> <p>10. Designation of Place as "Office" as a Criterion.</p> | <p>§ 11. Authority to appoint to Office constitutes a public Officer.</p> <p>12. Authentication by chief Executive not necessary.</p> <p>13. Lucrative Office — Office of Profit.</p> <p>14. Office coupled with an Interest.</p> <p>15. Honorary Office.</p> <p>16. Office of Trust.</p> <p>17. Place of Trust or Profit.</p> <p>18. Executive Officers.</p> <p>19. Legislative Officers.</p> <p>20. Judicial Officers.</p> <p>21. Ministerial Officers.</p> <p>22. Military Officers.</p> <p>23. Naval Officers.</p> <p>24. Civil Officers.</p> <p>25. Officer <i>de Jure</i>.</p> <p>26. Officer <i>de Facto</i>.</p> |
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§ 1. Public Office and Officer defined.—A public office is the right, authority and duty, created and conferred by law, by

which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.<sup>1</sup> The individual so invested is a public officer.<sup>2</sup>

<sup>1</sup> An office, says BLACKSTONE, is "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging." 2 Com. 36.

"An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer." COOLEY, J. in *Throop v. Langdon*, 40 Mich. 673.

"Lexicographers generally define office to mean public employment, and I apprehend its legal meaning to be an employment on behalf of the government in any station or public trust, not merely transient, occasional or incidental. In common parlance, the term 'office' has a more general signification. Thus we say the office of executor or guardian; or the office of a friend." PLATT, J. in *Matter of Oaths*, 20 Johns. (N. Y.) 493.

"Whether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold, or to be in, office." DANFORTH, J. in *Rowland v. Mayor*, 88 N. Y. 376.

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties."

SWAYNE, J. in *United States v. Hartwell*, 6 Wall. (U. S.) 885, 893.

For other definitions and illustrations see: *Hamlin v. Kassafer*, 15 Ore. 456, 8 Am. St. Rep. 176; *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; where PEARSON, C. J., says "A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State;" *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *Matter of Dorsey*, 7 Port. (Ala.) 293; *Miller v. Supervisors*, 25 Cal. 98; *Wood's Case*, 2 Cow. (N. Y.) 29, note; *People v. Hayes*, 7 How. (N. Y.) Pr. 248; *People v. Stratton*, 28 Cal. 388; *State v. Valle*, 41 Mo. 81; *Eliason v. Coleman*, 86 N. C. 235; *Opinion of Judges*, 8 Greenl. (Me.) 481; *Hill v. Boyland*, 40 Miss. 618; *Hall v. State*, 39 Wis. 85; *People v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *Henly v. Mayor*, 5 Bing. 91; *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197; *Smith v. Moore*, 90 Ind. 294; *People v. Common Council*, 77 N. Y. 503, 33 Am. Rep. 659; *Commonwealth v. Gamble*, 62 Penn. St. 843, 1 Am. Rep. 423.

<sup>2</sup> "The term 'office,'" says ALLEN, J. in *Matter of Hathaway*, 71 N. Y. 238, 243, "has a very general signification, and is defined to be that function by virtue whereof a person has some employment in the affairs of

As here used, the word office is to be distinguished from its application to such positions as are at most *quasi* public only, as the charge or office of an executor, administrator or guardian, and from the offices of private corporations.

§ 2. **How Office differs from Employment.**—A public office differs in material particulars from a public employment, for, as was said by Chief Justice MARSHALL, “although an office is an employment, it does not follow that every employment is an

another; and it may be public, or private, or *quasi* public, as exercised under public authority, but yet affecting only the affairs of particular individuals. The presidency of a bank is spoken of as an office, and a trustee of a private trust is, in ordinary parlance, said to hold the office of trustee; and the term office is applied to an executor or guardian, etc. A referee, for the trial and decision of actions, is an officer exercising judicial powers under public authority. So receivers appointed by the courts, and commissioners for the appraisal of damages for lands taken for public use, are officers; and strictly and technically exercise the functions of an office. But they are not ‘public officers’ within the inhibition of the Constitution (which prohibited judges from exercising “any power of appointment to public office).” \* \* \* While the duties of the class of officers last named, referees, etc., were of a public nature, and in a sense concerned the public and the administration of justice, and were exercised under authority derived from the State directly, and not from individuals, still they related especially to particular individuals and a specific litigation; and their authority is restricted to specific matters, and no general powers are conferred upon them authorizing to act in respect to all like cases, or in any case or matter other than specified and named in their ap-

pointment. They owed no duty to the public, and could perform no service for the public. The trust they exercise and the duties they perform are ‘transient and occasional.’ They are not called upon to take the constitutional oath of office, and are not entitled to the emoluments of the office, except such as grow out of and pertain to the duties actually performed. Judge PLATT defines the legal meaning of the term ‘office’ to be ‘an employment on behalf of the government in any station or public trust, not merely transient, occasional or incidental.’ (*In re Attorneys*, etc., 20 Johns. (N. Y.) 492). When ‘public’ is the prefix of ‘officer,’ the definition is very apt, and clearly and with precision marks the limit of the constitutional prohibition. \* \* \* ‘Public office,’ as used in the constitution, has respect to a permanent trust to be exercised in behalf of the government, or of all citizens who may need the intervention of a public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law.”



office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer."<sup>1</sup>

"We apprehend that the term 'office,' " said the judges of the supreme court of Maine, "implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments and sometimes to another; still it is a legal power which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the exercise of any standing laws which are considered as rules of action and guardians of rights."<sup>2</sup>

"The officer is distinguished from the employee," says Judge COOLEY, "in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or non-feasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases, other distinctions will appear which are not general."<sup>3</sup>

§ 3. Office differs from a Contract.—An office also differs

<sup>1</sup> United States v. Maurice, 2 Brock. (U. S. C. C.) 96.

<sup>2</sup> Opinion of Judges, 8 Greenl. (Me.) 481.

<sup>3</sup> Throop v. Langdon, 40 Mich. 673, 682.

"An office is a public position created by the constitution or law, con-

tinuing during the pleasure of the appointing power or for a fixed term with a successor elected or appointed. An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished." Cons. Ill., 1870, Art. 5, § 24.

from a contract, for, as has been said, "the latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."<sup>1</sup>

§ 4. **Office involves Delegation of Sovereign Functions.**—The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public;—that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.<sup>2</sup>

§ 5. **Office is created by Law and not by Contract.**—In distinguishing between an office and an employment, the fact that the powers in question are created and conferred by law, is an important criterion. For though an employment may be created by law, it is not necessarily so, but is often, if not usually, the creature of contract. A public office, on the other hand, is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power. Where, therefore, the authority in question was conferred by a contract, it must be regarded as an employment and not as a public office.<sup>3</sup>

<sup>1</sup> *United States v. Hartwell*, 6 Wall. (U. S.) 385, 393; *United States v. Maurice*, 2 Brock. 103; *Matter of Oaths*, 20 Johns. (N. Y.) 493; *Vaughn v. English*, 8 Cal. 39; *Sanford v. Boyd*, 2 Cranch. (U. S. C. C.) 78.

<sup>2</sup> *Bunn v. People*, 45 Ill. 397; *Ellison v. Coleman*, 86 N. C. 235; *United States v. Lockwood*, 1 Pin. (Wis.) 359; *Commonwealth v. Swasey*, 133 Mass. 538; *Doyle v. Aldermen*, 89 N. C. 133, 45 Am. Rep. 677; *Opinion of Judges*, 3 Greenl. (Me.) 403; *Miller v. Supervisors*, 25 Cal. 98; *State v. Kirk*, 44 Ind. 401; 15 Am. Rep. 239;

*Hill v. Boyland*, 40 Miss. 618; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *People v. Nichols*, 52 N. Y. 473, 11 Am. Rep. 734; *United States v. Germaine*, 99 U. S. 508; *United States v. Smith*, 124 U. S. 525; *United States v. Mouat*, 124 U. S. 303.

<sup>3</sup> *Hall v. Wisconsin*, 103 U. S. 5; *United States v. Maurice*, 2 Brock. (U. S. C. C.) 102; *United States v. Hartwell*, 6 Wall. (U. S.) 385; *Brown v. Turner*, 70 N. C. 93; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *Opinion of Judges*, 3 Greenl. (Me.)

§ 6. **Oath a usual but not a necessary Criterion.** — Public officers are usually required by law to take the oath of office, and this fact goes far in determining the character of the duty.<sup>1</sup> But the taking of the oath is not an indispensable criterion and the office may exist without it, for, as has been said, the oath is a mere incident and constitutes no part of the office.<sup>2</sup>

§ 7. **Salary or Fees not a necessary Criterion.** — Like the requirement of an oath, the fact of the payment of a salary or fees may aid in determining the nature of the position, but it is not conclusive, for while a salary or fees are usually annexed to the office, it is not necessarily so.<sup>3</sup> As in the case of the oath, the salary or fees are mere incidents and form no part of the office.<sup>4</sup> Where a salary or fees are annexed, the office is often said to be “coupled with an interest”; where neither is provided for it is a naked or honorary office, and is supposed to be accepted merely for the public good.<sup>5</sup>

§ 8. **Duration or Continuance as Criterion.** — The term office, it is said,<sup>6</sup> embraces the idea of tenure and duration, and certainly a position which is merely temporary and local cannot ordinarily be considered an office.<sup>7</sup> “But,” says Chief Justice Marshall,

481; *Bunn v. People*, 45 Ill. 406; *People v. Nostrand*, 46 N. Y. 381.

“Certainly where an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public assigned to him by law, he must be regarded as a public officer.”

JENKINS, J. in *Bradford v. Justices*, 33 Ga. 386.

<sup>1</sup> *State v. Wilson*, 29 Ohio St. 347; *Kavanaugh v. State*, 41 Ala. 399; *Lindsey v. Attorney General*, 33 Miss. 508; *Sweeny v. Mayor*, 5 Daly (N. Y.) 274.

<sup>2</sup> *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *Howerton v. Tate*, 68 N. C. 547.

<sup>3</sup> As has been seen in the note to § 1, “the right to take the fees and

emoluments thereof” constitutes a portion of several of the definitions of an office, but it is not a *sine qua non*.

<sup>4</sup> *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *Howerton v. Tate*, 68 N. C. 547; *State v. Kennon*, 7 Ohio St. 546; *United States v. Hartwell*, 6 Wall. (U. S.) 835.

<sup>5</sup> *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *Throop v. Langdon*, 40 Mich. 673, 682.

<sup>6</sup> SWAYNE J. in *United States v. Hartwell*, 6 Wall. (U. S.) 835, 893.

<sup>7</sup> *United States v. Hartwell*, 6 Wall. (U. S.) 835; *United States v. Maurice*, 2 Brock. (U. S. C. C.) 108; *Bunn v. People*, 45 Ill. 397; *State v. Wilson*, 29 Ohio St. 347; *Hill v. Boyland*, 40 Miss. 618; *United States v. Hatch*, 1 Pinn. (Wis.) 182; *Commonwealth v.*

"if a duty be a continuing one, which is defined by rules prescribed by the government and not by contract, which an individual is appointed by government to perform, who enters on the duties pertaining to his station without any contract defining them, if those duties continue though the person be changed,—it seems very difficult to distinguish such a charge or employment from an office or the person who performs the duties from an officer."<sup>1</sup>

At the same time, however, this element of continuance can not be considered as indispensable, for, if the other elements are present "it can make no difference," says PEARSON, C. J., "whether there be but one act or a series of acts to be done,—whether the office expires as soon as the one act is done, or is to be held for years or during good behavior."<sup>2</sup>

§ 9. **Scope of Duties as a Criterion.**—"Any man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits; for it is the duty of his office and the nature of that duty which make him an officer, and not the extent of his authority."<sup>3</sup>

Sutherland, 8 Serg. & R. (Penn.) 149; Sheboygan County v. Parker, 3 Wall. (U. S.) 98; People v. Nichols, 59 N. Y. 478, 11 Am. Rep. 734; Throop v. Langdon, 40 Mich. 678.

So it is said that the term office means "an employment on behalf of the government in any station or public trust, *not merely transient, occasional or incidental.*" *In re Attorneys*, 20 Johns. (N. Y.) 492.

Commissioners appointed for an indefinite time are not public officers. *McArthur v. Nelson*, 81 Ky. 67.

A person employed for a special and single object, in whose employment there is no enduring element, nor designed to be, and whose duties when completed, although years may be required for their performance, *ipso facto* terminate the employment, is not an officer in the sense in which that term is used in the constitution

of Illinois. *Bunn v. People*, 45 Ill. 397.

"In every definition given of the word 'office,' the features recognized as characteristic, and distinguishing it from a mere employment, are the manner of appointment, and the nature of the duties to be performed; whether the duties are such as pertain to the particular official designation, and are continuing and permanent, and not occasional or temporary." *State v. Board of Public Wks.*, — N. J. —, 17 Atl. Rep. 112.

<sup>1</sup> In *United States v. Maurice*, 2 Brock. (U. S. C. C.) 103, quoted with approval in *Bunn v. People*, 45 Ill. 397.

<sup>2</sup> In *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488. See also *Commonwealth v. Evans*, 74 Penn. St. 124; *Vaughn v. English*, 8 Cal. 39.

<sup>3</sup> *Carth.* 479; 7 Bac. Abr. 280; *State*

§ 10. **Designation of Place as "Office" as a Criterion.**—The fact that the place is designated, in the law providing for its creation, as an *office*, affords some reason for determining it to be such.<sup>1</sup>

§ 11. **Authority to appoint to Office constitutes a public Officer.**—The authority and duty of appointing others to office, of themselves constitute the person vested with that authority and duty a public officer, and it is immaterial that such person is not designated as an officer and takes no oath and receives no fees.<sup>2</sup>

§ 12. **Authentication by chief Executive not necessary.**—Where an individual has been appointed or elected, in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public assigned to him by law, he must be regarded as a public officer, and it can make no difference whether he be commissioned by the chief executive officer with the authentication of the seal of state or not. Where that is given it is but evidence of his title to the office, and this evidence may in some cases be of greater and in others of less solemnity.<sup>3</sup>

§ 13. **Lucrative Office, or Office of Profit.**—An office to which salary, compensation or fees are attached is a lucrative office, or, as it is frequently called, an office of profit.<sup>4</sup> The amount of the salary or compensation attached is not material. The amount attached is supposed to be an adequate compensation and fixes the character of the office as a lucrative one, or an office of profit.<sup>5</sup>

*v. Valle*, 41 Mo. 31; *Shelby v. Alcorn*, 36 Miss. 273, 73 Am. Dec. 169; *Vaughn v. English*, 8 Cal. 39.

<sup>1</sup> *Bradford v. Justices*, 33 Ga. 332; *State v. Wilson*, 29 Ohio St. 347; *United States v. Tinklepaugh*, 3 Blatchf. (U. S. C. C.) 430.

<sup>2</sup> *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *Hoke v. Henderson*, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677; *Howerton v. Tate*, 68 N. C. 547; *State v. Kennon*, 7 Ohio St. 546.

<sup>3</sup> *Bradford v. Justices*, 33 Ga. 332.

<sup>4</sup> *Dailey v. State*, 8 Blackf. (Ind.)

329; *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239; *State v. Vallè*, 41 Mo. 29; *People v. Whitman*, 10 Cal. 38; *Crawford v. Dunbar*, 53 Cal. 86; *Kerr v. Jones*, 19 Ind. 351; *State v. DeGress*, 53 Tex. 387; *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538; *Foltz v. Kerlin*, 105 Ind. 231, 55 Am. Rep. 197.

<sup>5</sup> *Dailey v. State*, 8 Blackf. (Ind.) 329. In this case it is said: "Pay, supposed to be an adequate compensation, is attached to the performance of their duties. We know of no other

§ 14. **Office coupled with an Interest.**—An office to which a salary or fees are attached is often said to be an office “coupled with an interest.”<sup>1</sup>

§ 15. **Honorary Office.**—So an office to which no compensation attaches is frequently called a naked or honorary office, and is supposed to be accepted merely for the public good.<sup>2</sup>

§ 16. **Office of Trust.**—An office whose duties and functions require the exercise of discretion, judgment, experience and skill is an office of trust, and it is not necessary that the officer should have the handling of public money or property, or the care and oversight of some pecuniary interest of the government.<sup>3</sup>

§ 17. **Place of Trust or Profit.**—The term place of trust or profit is frequently used to designate positions which approximate to, but are not strictly offices, and yet occupy the same general level in dignity and importance.<sup>4</sup>

§ 18. **Executive Officers.**—“Executive officers are those whose duties are mainly to cause the laws to be executed.”<sup>5</sup>

§ 19. **Legislative Officers.**—“Legislative officers are those whose duties relate mainly to the enactment of laws, such as members of Congress and of the several state Legislatures.”<sup>6</sup>

§ 20. **Judicial Officers.**—“Judicial officers are those whose duties are to decide controversies between individuals and accusations made in the name of the public against persons charged with a violation of the law.”<sup>7</sup>

test for determining a ‘lucrative office’ within the meaning of the constitution. The lucrativeness of an office—its net profits—does not depend upon the amount of compensation affixed to it. The expenses incident to an office with a high salary may render it less lucrative, in this latter sense, than other offices having a much lower rate of compensation.”

<sup>1</sup> *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488.

<sup>2</sup> *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488.

<sup>3</sup> *In re Corliss*, 11 R. I. 688, 23 Am. Rep. 538. See *Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677.

<sup>4</sup> See *Doyle v. Aldermen of Raleigh*, 89 N. C. 133, 45 Am. Rep. 677.

<sup>5</sup> *Bouvier's Law Dictionary*, title “Officer.”

<sup>6</sup> *Bouvier's Law Dictionary*, title “Officer.”

<sup>7</sup> *Bouvier's Law Dictionary*, title “Officer.”

§ 21. **Ministerial Officers.**—"Ministerial officers are those whose duty it is to execute the mandates, lawfully issued, of their superiors."<sup>1</sup>

§ 22. **Military Officers.**—"Military officers are those who have command in the army."<sup>2</sup>

§ 23. **Naval Officers.**—"Naval officers are those who are in command in the navy."<sup>3</sup>

§ 24. **Civil Officers.**—"Any officer who holds his appointment under the government, whether his duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy, is a civil officer."<sup>4</sup>

§ 25. **Officer de Jure.**—"An officer *de jure* is one who is, in all respects, legally appointed and qualified to exercise the office.<sup>5</sup> The distinction between an officer *de jure*, an officer *de facto*, and a mere intruder, is one of great importance and will be fully considered hereafter."<sup>6</sup>

§ 26. **Officer de Facto.**—"An officer *de facto*," in the comprehensive language of Chief Justice BUTLER of Connecticut, "is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:—

First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be;

Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some

<sup>1</sup> Bouvier's Law Dictionary, title "Officer."

<sup>2</sup> Bouvier's Law Dictionary, title "Officer."

<sup>3</sup> Bouvier's Law Dictionary, title "Officer."

<sup>4</sup> Rawle Const. 218; Story Const. § 790.

<sup>5</sup> Plymouth v. Painter, 17 Conn. 585, 44 Am. Dec. 574.

<sup>6</sup> See *post*, § 817.

precedent requirement or condition, as to take an oath, give a bond, or the like;

Third, under color of a known election or appointment, void, because the officer was not eligible or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public;

Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.”<sup>1</sup>

The full discussion of this question is reserved for a subsequent section.<sup>2</sup>

<sup>1</sup> In *State v. Carroll*, 88 Conn. 449,  
9 Am. Rep. 409.

<sup>2</sup> See *post*, § 317.



## CHAPTER II.

## WHO ARE PUBLIC OFFICERS.

## § 27. Purpose of this Chapter.

- 28. Assessors.
- 29. Attorneys at Law.
- 30. Attendants upon Courts.
- 31. Clergymen.
- 32. Clerks.
- 33. Collectors.
- 34. College Professors.
- 35. Commissioners.
- 36. Contractors.
- 37. Court Crier.
- 38. Deputies.
- 39. Health Officers.
- 40. Judges and Justices.
- 41. Mail Carriers.
- 42. Medical Superintendent.
- 43. Members of Municipal Boards and Bodies.
- 44. Messengers.

## § 45. Merchant Appraisers.

- 46. Navy Officers.
- 47. Notary Public.
- 48. Pension Agents.
- 49. Pilots.
- 50. Postmaster.
- 51. Public Printer.
- 52. Receivers.
- 53. Referees.
- 54. Representatives in Legislatures.
- 55. School Officers.
- 56. Selectmen.
- 57. Special Commissioners.
- 58. State and other Treasurers.
- 59. Surgeons.
- 60. Superintendents of Canals.
- 61. Trustees of State Institutions.
- 62. Watchmen of Public Buildings.

§ 27. **Purpose of this Chapter.**—Having in the preceding chapter, ascertained the definitions, divisions and distinctions which govern this question, it will be now attempted to show, by practical illustrations, how they have been applied, particular reference being paid to those cases which lie upon debatable or doubtful ground.

§ 28. **Assessors.**—Assessors of taxes are independent public officers with duties prescribed by law.<sup>1</sup>

§ 29. **Attorneys at Law.**—“An attorney at law,” says GRAY, C. J.,<sup>2</sup> “is not indeed, in the strictest sense, a public officer. But he comes very near it. As was said by Lord Holt,<sup>3</sup> ‘the office

<sup>1</sup> *Lorillard v. Town of Monroe*, 11 N. Y. 393, 63 Am. Dec. 120.

<sup>2</sup> In *Robinson's case*, 131 Mass. 376, 41 Am. Rep. 239. See also *Ex parte*

*Yale*, 24 Cal. 241, 85 Am. Dec. 63, to like effect.

<sup>3</sup> *White's case*, 6 Mod. 18.

of an attorney concerns the public, for it is for the administration of justice.” And RYAN, C. J., says “that attorneys and counsellors of a court, though not properly *public* officers are *quasi* officers of the State whose justice is administered by the court.”<sup>1</sup> In a few cases, however, they have been held to be public officers.\* An attorney at law does not hold a lucrative office nor an office of profit and emolument under the government.<sup>2</sup>

§ 30. *Attendants upon Courts.*— Whether attendants upon courts are public officers is a question upon which there has been a difference of opinion, and one to be determined largely by reference to the duties involved and by a construction of the particular statutes creating them. In some cases such attendants have been spoken of as mere servants of the court,<sup>3</sup> but in certain later cases, it has been held that an attendant upon a court whose duty it is to be present at its sittings, to execute its commands, secure order and attend on juries, is a public officer.<sup>4</sup>

§ 31. *Clergymen.*— A clergyman in the administration of marriage is a public civil officer, and his acts in the celebration of marriage are admissible as *prima facie* evidence of his official character.<sup>5</sup> But the office of a clergyman is a merely spiritual or ecclesiastical one where no temporal right, such as the enjoyment of an endowment or emolument, is attached to it; and the wrongful exclusion from such an office does not involve any legal right of which a court of law can take cognizance.<sup>6</sup> Where

<sup>1</sup> In matter of Mosness, 39 Wis. 509, 20 Am. Rep. 55. See also, Bradley's case, 7 Wall. (U. S.) 364, 378, 379; Thomas v. Steele, 23 Wis. 207; Cothren v. Connaughton, 24 Wis. 184; Austin's case, 5 Rawle (Penn.) 191, 28 Am. Dec. 657.

<sup>2</sup> Wood's case, 2 Cow. (N. Y.) 29, note; Seymour v. Ellison, 2 Cow. (N. Y.) 29; Matter of Wood, 1 Hopk. Ch. (N. Y.) 7; Richardson v. Brooklyn, &c. R. R. Co. 23 How. Pr. (N. Y.) 368. But see Matter of Oatha, 20 Johns. (N. Y.) 422; Matter of Dorsey, 7 Port. (Ala.) 293.

<sup>3</sup> Leigh's case, 1 Munf. (Va.) 468, 469.

<sup>4</sup> See Sweeney v. Mayor, 58 N. Y. 625; Holley v. Mayor, 59 N. Y. 166; Brennan v. Mayor, 63 N. Y. 365; Wines v. Mayor, 9 Hun (N. Y.) 659; Rowland v. Mayor, 44 N. Y. Super. Ct. 559.

<sup>5</sup> Rowland v. Mayor, 63 N. Y. 372; Moser v. Mayor, 21 Hun (N. Y.) 163.

<sup>6</sup> Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121.

<sup>7</sup> Union Church v. Sanders, 1 Houston (Del.) 100, 68 Am. Dec. 187.

any temporal right is attached, however, which is affected by such exclusion, a legal right is involved, and where no other adequate remedy is furnished, *mandamus* will lie to restore him to his office.<sup>1</sup>

§ 32. *Clerks.*—A clerk in the office of an assistant treasurer of the United States, appointed by the assistant treasurer with the approbation of the secretary of the treasury pursuant to law and whose compensation is fixed by law and whose duties are continuing and permanent, is a public officer.<sup>2</sup> A clerk of the fractional currency counter in the treasury department appointed with the approbation of the secretary and charged with the safekeeping of public funds is an officer of the United States.<sup>3</sup>

A clerkship in the treasury department and one in the attorney-general's office, are offices, within a provision forbidding one person from drawing the salary of two different offices.<sup>4</sup> A clerk in the office of the secretary of state is an officer,<sup>5</sup> and so is an assistant clerk of the board of aldermen of New York city, appointed by authority of a statute.<sup>6</sup>

A paymaster's clerk, appointed by a paymaster in the navy, with the approval of the secretary of the navy, but there being no statute authorizing the secretary of the navy to appoint such a clerk, nor any act requiring his approval of such an appointment, is not an officer of the United States;<sup>7</sup> nor is a clerk of the collector of customs, holding his position at the will of the latter and discharging only such duties as may be assigned to him by that officer.<sup>8</sup>

A clerk of the United States district court is an "inferior"

<sup>1</sup> *Union Church v. Sanders*, 1 Houston (Del.) 100, 68 Am. Dec. 187; *Runkel v. Winemiller*, Gen'l Ct. 4 H. & McH. (Md.) 429, 1 Am. Dec. 411.

<sup>2</sup> *United States v. Hartwell*, 6 Wall. (U. S.) 385.

<sup>3</sup> *United States v. Bloomgart*, 2 Ben. (U. S. D. C.) 356. But see *United States v. Smith*, 124 U. S. 525; *United States v. Mouat*, 124 U. S. 308.

<sup>4</sup> *Talbot v. United States*, 10 Ct. of Cl. 426.

<sup>5</sup> *Vaughn v. English*, 8 Cal. 89.

<sup>6</sup> *Collins v. Mayor*, 8 Hun (N. Y.) 680.

<sup>7</sup> *United States v. Mouat*, 124 U. S. 308.

<sup>8</sup> *United States v. Smith*, 124 U. S. 525.

officer; <sup>1</sup> but the enrolling clerk of the house of representatives of a state is not a public officer.<sup>2</sup>

The chief clerk in the office of the assessor of the city of Detroit was held not to be a public officer.<sup>3</sup>

§ 33. **Collectors.**—Collectors of taxes are independent public officers, whose duties are prescribed by law.<sup>4</sup>

§ 34. **College Professors.**—A professor in a state university is not a public officer.<sup>5</sup>

§ 35. **Commissioners.**—A levee commissioner in Mississippi is a "civil officer under the State;" <sup>6</sup> a commissioner for the construction of a public highway, is a public officer,<sup>7</sup> and so is a commissioner appointed by an act of the legislature to lay out and build a public road,<sup>8</sup> and so are commissioners appointed by the governor to construct a public building.<sup>9</sup>

But a commissioner appointed to make a State survey under an act authorizing the governor to enter into a contract with the commissioner for doing the work, is not a public officer;<sup>10</sup> nor are commissioners appointed to superintend the erection of a state house;<sup>11</sup> nor are commissioners to fund a city debt;<sup>12</sup> nor are commissioners appointed for an indefinite time.<sup>13</sup> Canal commissioners are not "civil officers;"<sup>14</sup> nor are commissioners to make a survey of state land offices in contemplation of a statute forbidding judicial officers from holding any other office of profit.<sup>15</sup> Commissioners appointed to conduct a lottery are not public officers;<sup>16</sup> nor are bank commissioners appointed for the

<sup>1</sup> *Ex parte* Hennen, 18 Pet. (U. S.) 230.

<sup>2</sup> *State v. Gardner*, 43 Ala. 284.

<sup>3</sup> *Throop v. Langdon*, 40 Mich. 675.

<sup>4</sup> *Lorillard v. Town of Monroe*, 11 N. Y. 392, 63 Am. Dec. 120; *Morse v. Lowell*, 7 Metc. (Mass.) 152; *People v. Bedell*, 2 Hill (N. Y.) 196; *State v. Walton*, 62 Me. 106.

<sup>5</sup> *Butler v. Board of Regents*, 83 Wis. 124.

<sup>6</sup> *Shelby v. Alcorn*, 86 Miss. 273, 73 Am. Dec. 169.

<sup>7</sup> *People v. Nostrand*, 46 N. Y. 881; *People v. Hurlburt*, 24 Mich. 59,

<sup>8</sup> Am. Rep. 108.

<sup>9</sup> *People v. Hayes*, 7 How. Pr. (N. Y.) 248.

<sup>10</sup> *People v. Comptroller*, 20 Wend. (N. Y.) 595.

<sup>11</sup> *Hall v. Wisconsin*, 108 U. S. 5; overruling 89 Wis. 79.

<sup>12</sup> *Bunn v. People*, 45 Ill. 897.

<sup>13</sup> *People v. Middleton*, 28 Cal. 608.

<sup>14</sup> *McArthur v. Nelson*, 81 Ky. 67.

<sup>15</sup> *United States v. Hatch*, 1 Pinn. (Wis.) 182.

<sup>16</sup> *Shepherd v. Commonwealth*, 1 Serg. & R. (Penn.) 1.

<sup>17</sup> *State v. Platt*, 4 Harr. (Del.) 154.

liquidation of insolvent banks;<sup>1</sup> nor are commissioners appointed to determine upon the purchase by the State of interesting relics.<sup>2</sup> The office of commissioner of loans of a county is a county office;<sup>3</sup> but commissioners appointed by the State to sign city treasury warrants which were to circulate as money, were held to be State and not city officers;<sup>4</sup> and commissioners appointed by the legislature to lay city pavements are not officers of the city;<sup>5</sup> nor are special commissioners appointed by the legislature to act for counties in aiding railroads, county officers.<sup>6</sup> The office of county commissioner is a "lucrative" one;<sup>7</sup> and the office of a commissioner of the United States Centennial Commission is an "office of trust."<sup>8</sup>

§ 36. **Contractors.**—As has been seen,<sup>9</sup> persons whose powers and duties are conferred and created by contract, are not public officers. A contractor for carrying the mail is, therefore, not a public officer.<sup>10</sup>

§ 37. **Court Crier.**—A court crier appointed by the court under statutory authority, his salary being payable by the board of supervisors, is a public officer.<sup>11</sup>

§ 38. **Deputies.**—Whether deputies appointed by public officers are to be regarded as public officers themselves, depends upon the circumstances and method of their appointment. Where such appointment is provided for by law, and *a fortiori* where it is required by law, which fixes the powers and duties of such deputies, and where such deputies are required to take the oath of office and to give bonds for the performance of their duties, the deputies are usually regarded as public officers. Thus deputy postmasters appointed and qualified according to law,

<sup>1</sup> Conrey v. Copland, 4 La. Ann. 307.

<sup>2</sup> People v. Nichols, 53 N. Y. 478, 11 Am. Rep. 734.

<sup>3</sup> Matter of Carpenter, 7 Barb. (N. Y.) 30.

<sup>4</sup> Garnier v. St. Louis, 37 Mo. 554.

<sup>5</sup> Greston v. Griffin, 4 Abb. Pr. N. S. (N. Y.) 810.

<sup>6</sup> Sheboygan County v. Parker, 8 Wall. (U. S.) 93. See also, Walker v.

Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24.

<sup>7</sup> Dailey v. State, 8 Blackf. (Ind.) 329.

<sup>8</sup> In re Corliss, 11 R. L. 638, 23 Am. Rep. 538.

<sup>9</sup> See *ante*, § 5.

<sup>10</sup> Sawyer v. Corse, 17 Gratt. (Va.) 230, 24 Am. Dec. 445.

<sup>11</sup> Ricketts v. New York, 67 How. Pr. (N. Y.) 320.

are public officers.' So a deputy marshal is an officer of the United States,<sup>1</sup> and deputy sheriffs are recognized by the statutes of most States as independent public officers.<sup>2</sup>

But where the deputy is appointed merely at the will and pleasure of his principal to serve some purpose of the latter, he is not a public officer but a mere servant or agent.<sup>3</sup> So a special deputy employed only in a particular case is not a public officer.<sup>4</sup>

§ 39. **Health Officers.**—The health officer of a port does not become an officer of the United States by virtue of the surrender to him, by the United States naval authorities, of an infected vessel.<sup>5</sup>

§ 40. **Judges and Justices.**—Judges of courts<sup>6</sup> and justices of the peace<sup>7</sup> are public officers.

§ 41. **Mail Carrier.**—A mail carrier is not a public officer but the private agent of the contractor for carrying the mail.<sup>8</sup>

§ 42. **Medical Superintendent.**—The medical superintendent of an asylum for the insane, holding a position whose powers and duties are provided for by statute is a public officer.<sup>9</sup>

§ 43. **Members of Municipal Boards and Bodies.**—The members of municipal boards, like a board of public works, are public officers.<sup>10</sup> So are members of a common council.<sup>11</sup>

<sup>1</sup> *Lane v. Cotton*, 1 *Ld. Raym.* 646; *Schroyer v. Lynch*, 8 *Watts* (Penn.) 453; *Wiggins v. Hathaway*, 6 *Barb.* (N. Y.) 632; *Dunlop v. Monroe*, 7 *Cranch* (U. S.) 242; *Bolan v. Williamson*, 1 *Brev. (S. C.)* 181; *Maxwell v. McIlvoy*, 2 *Bibb. (Ky.)* 211; See *Conwell v. Voorhees*, 18 *Ohio* 533, 43 *Am. Dec.* 266.

<sup>2</sup> *United States v. Martin*, 17 *Fed. Rep.* 150; *United States v. Tinkler*, 8 *Blatch. (U. S. C. C.)* 480.

<sup>3</sup> *Eastman v. Curtis*, 4 *Vt.* 616; *Dayton v. Lynes*, 30 *Conn.* 351; *Towns v. Harris*, 18 *Tex.* 507.

<sup>4</sup> *Kavanaugh v. State*, 41 *Ala.* 399; *Sawyer v. Corse*, 17 *Gratt. (Va.)* 243, 94 *Am. Dec.* 445. Deputy clerkship

is not an office. *Jeffries v. Harrington*, — *Colo.* — 17 *Pac. Rep.* 505.

<sup>5</sup> *Kavanaugh v. State*, 41 *Ala.* 399.

<sup>6</sup> *Delano v. Goodwin*, 48 *N. H.* 203. But see *Cox v. United States*, 14 *Ct. of Cl.* 512.

<sup>7</sup> *Commonwealth v. Gamble*, 63 *Penn. St.* 343, 1 *Am. Rep.* 422.

<sup>8</sup> *People v. Ransom*, 58 *Cal.* 553.

<sup>9</sup> *Sawyer v. Corse*, 17 *Gratt. (Va.)* 230, 94 *Am. Dec.* 445.

<sup>10</sup> *State v. Wilson*, 29 *Ohio St.* 347. See also *Dullam v. Willson*, 58 *Mich.* 392, 51 *Am. Rep.* 128.

<sup>11</sup> *People v. Hurlburt*, 24 *Mich.* 59, 9 *Am. Rep.* 103.

<sup>12</sup> *State v. Anderson*, — *Ohio St.* —, 12 *N. E. Rep.* 656.

§ 44. **Messengers.**—A “messenger to the president of the board of aldermen” in the city of New York is not a public officer, there being no statute creating such an office or defining its duties.<sup>1</sup>

§ 45. **Merchant Appraisers.**—A merchant appraiser is not a public officer.<sup>2</sup>

§ 46. **Navy Officers.**—Navy officers are officers of the United States.<sup>3</sup>

§ 47. **Notary Public.**—A notary public is a public officer.<sup>4</sup>

§ 48. **Pension Agents.**—A pension agent of the United States, not being required to take an oath of office or to perform any other services than such as are confided to him by the war department, is not an officer of the United States.<sup>5</sup>

§ 49. **Pilot.**—Pilots are not public officers.<sup>6</sup>

§ 50. **Postmaster.**—A United States postmaster is a public officer.<sup>7</sup>

§ 51. **Public Printer.**—It is entirely competent for the legislature to make the public printer a state officer, and where they have expressly done so he will be so considered;<sup>8</sup> but where the public printing is by law to be “contracted for” the person employed is not a public officer.<sup>9</sup>

§ 52. **Receivers.**—The receiver of a national bank, appointed in accordance with an Act of Congress, is an officer of the United States,<sup>10</sup> and receivers of public money are public officers.<sup>11</sup>

§ 53. **Referees.**—Referees appointed to examine witnesses,

<sup>1</sup> *Smith v. Mayor*, 67 Barb. (N. Y.) 223.

<sup>2</sup> *Auffmordt v. Hedden*, 30 Fed. Rep. 360.

<sup>3</sup> *Armstrong v. United States*, Gilp. (U. S. D. C.) 399.

<sup>4</sup> *Kirksey v. Bates*, 7 Port. (Ala.) 529, 31 Am. Dec. 723; *Governor v. Gordon*, 15 Ala. 72.

<sup>5</sup> *Lindsey v. Attorney General*, 33 Miss. 503.

<sup>6</sup> *Dean v. Healy*, 66 Ga. 503.

<sup>7</sup> *Spence v. Harvey*, 23 Cal. 336, 83 Am. Dec. 69.

<sup>8</sup> *Ellis v. State*, 4 Ind. 1.

<sup>9</sup> *Brown v. Turner*, 70 N. O. 93. See *Detroit Free Press Co. v. State Auditors*, 47 Mich. 135.

<sup>10</sup> *Platt v. Beach*, 2 Ben. (U. S. D. C.) 303.

<sup>11</sup> *Commonwealth v. Evans*, 74 Penn. St. 124.

hear and determine cases, etc., are not public officers within the meaning of the constitution of New York.<sup>1</sup>

§ 54. **Representatives in Legislature.**—Representatives in state legislatures are public officers,<sup>2</sup> and so are representatives in Congress.<sup>3</sup>

§ 55. **School Officers.**—School directors, treasurers and trustees are public officers.<sup>4</sup>

§ 56. **Selectmen.**—A New England selectman is a public officer.<sup>5</sup>

§ 57. **Special Commissioners, etc.**—Special commissioners, referees, appraisers, receivers, elisors and other similar officers, appointed for a special purpose and to act on a special occasion, are not public officers.<sup>6</sup>

§ 58. **State and other Treasurers.**—State treasurers,<sup>7</sup> deputy state treasurers<sup>8</sup> and school treasurers<sup>9</sup> are public officers.

§ 59. **Surgeons.**—Civil surgeons appointed by the commissioner of pensions are not officers of the United States.<sup>10</sup>

§ 60. **Superintendents of Canals.**—Superintendents of repairs on a New York state canal are public officers.<sup>11</sup>

§ 61. **Trustees of State Institutions.**—The trustees and directors of state institutions, such as universities, prisons and asylums, appointed or elected in pursuance of the statutes of the state, are public officers.<sup>12</sup> But trustees appointed by authority

<sup>1</sup> *Matter of Hathaway*, 71 N. Y. 238, 244.

<sup>2</sup> *Morrill v. Haines*, 2 N. H. 243.

<sup>3</sup> *People v. Common Council*, 77 N. Y. 503, 33 Am. Rep. 659.

<sup>4</sup> *McCoy v. Curtice*, 9 Wend. (N. Y.) 17, 24 Am. Dec. 118; *Ogden v. Raymond*, 23 Conn. 879, 58 Am. Dec. 439; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Commonwealth v. Morrissey*, 86 Penn. St. 416.

<sup>5</sup> *State v. Boody*, 53 N. H. 610.

<sup>6</sup> *Matter of Hathaway*, 71 N. Y. 238, 244; *McArthur v. Nelson*, 81 Ky. 67.

<sup>7</sup> *People v. McKinney*, 10 Mich. 54.

<sup>8</sup> *State v. Brandt*, 41 Iowa, 593.

<sup>9</sup> *Commonwealth v. Morrissey*, 86 Penn. St. 416.

<sup>10</sup> *United States v. Germaine*, 99 U. S. 508.

<sup>11</sup> *Adair v. Brady*, 4 Hill (N. Y.) 630, 40 Am. Dec. 306; *Shepherd v. Lincoln*, 17 Wend. (N. Y.) 250.

<sup>12</sup> *Dullam v. Willson*, 53 Mich. 393, 51 Am. Rep. 128; *Nichols v. McKee*, 68 N. C. 439; *Welker v. Bledsoe*, 68 N. C. 437.



of the legislature to act for cities in giving aid to railroads are not public officers.<sup>1</sup>

§ 62. Watchmen of public Buildings.—A night watchman of a federal postoffice building, appointed by the Federal treasury department and receiving a monthly salary, does not “hold an office of trust or profit under the United States.”<sup>2</sup>

<sup>1</sup> Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24.

<sup>2</sup> Doyle v. Aldermen of Raleigh, 69 N. C. 183, 45 Am. Rep. 677.

## CHAPTER III.

### WHO MAY BE PUBLIC OFFICERS.

#### § 68. Purpose of this Chapter.

##### I. OF ELIGIBILITY IN GENERAL.

- 64. Not a natural Right.
- 65. May be controlled by Constitution.
- 66. In other cases Legislature may prescribe.
- 67. Right usually co-extensive with that of Suffrage.

##### II. CAUSES OF DISQUALIFICATION.

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- 69. Idiot ineligible.
- 70. Ability to read and write may be required.

###### 2. *Insufficient Age.*

- 71. What Offices may be held by Infants.
- 72. Constitution Limitations as to Age.

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- 74. Aliens can not hold Office.
- 75. Restriction to "Inhabitant" or "Voter."

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- 76. Constitutional Prohibitions.

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- 78. By Bribery or Fraud.
- 79. By being a Defaulter.
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- § 81. Property Qualifications may be required.

#### 8. *Insufficient Residence.*

- 82. Period of Residence usually required.

#### 9. *Want of Professional Attainments.*

- 83. Necessary professional Attainments may be required.

#### 10. *Preference to Veteran Soldiers.*

- 84. Such Preference may be enforced.
- 85. But not where it conflicts with constitutional Powers.

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- 86. Statutory Provisions for Examination.
- 87. Can not defeat constitutional Discretion.
- 88. Statute prescribing Qualification is directory.

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- 89. Effect of Removal of Disability before Term begins.
- 90. Same Subject—Wisconsin Cases.
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- 92. Same Subject—Other similar Considerations.
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§ 95. State vs. Federal.

96. Power of Legislature to affect constitutional Qualifications.

97. Where no constitutional Pro-

hibition, Legislature may change Qualifications.

§ 98. Legislature cannot make political Opinions a Qualification.

99. Nor can religious Opinions be made a Test.

§ 63. **Purpose of this Chapter.**—Having considered in the preceding chapters what constitutes a public office and officer, and having given some illustrations of the application of the rules discovered, attention will now be given to the question of who are eligible to become public officers.

## I.

## OF ELIGIBILITY IN GENERAL.

§ 64. **Not a natural Right.**—The right to hold a public office under our political system is not a natural right. “While many rights are consecrated as universal and inviolable, the right of eligibility to office is not so secured.”<sup>1</sup> It exists, where it exists at all, only because and by virtue of some law expressly or impliedly creating and conferring it.

§ 65. **May be controlled by the Constitution.**—It is entirely competent for the people, in framing their governments, to declare what shall be the qualifications which shall entitle one to hold and exercise a public office, and in many of the constitutions this has been done with more or less certainty and precision. Constitutional provisions, which are exclusive in their nature, are, of course, supreme, and it is not within the power of legislatures to supersede, evade or alter them.\*

§ 66. **In other Cases Legislature may prescribe.**—Where, however, the constitution does not prescribe the qualifications, it is the province and the right of the legislature to declare upon what terms and subject to what conditions the right shall be conferred.

And where the constitution has made some provision, but not

\*Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

\*See post, §§ 96, 97.

exclusive ones, the legislature may add such others as are reasonable and proper.<sup>1</sup>

§ 67. **Right usually co-extensive with that of Suffrage.**—Where no limitations are prescribed, however, the right to hold a public office under our political system is an implied attribute of citizenship, those and those only who are competent to participate in choosing officers being in general deemed eligible to be chosen.<sup>2</sup> A person having the general qualifications of an elector, however, would be eligible under this rule, though for some temporary reason, such as a neglect to register and the like, he might not be able to vote at a particular election. But the rule given is not universal,<sup>3</sup> and many cases exist where it does not apply; there are also many other conditions which, by express rule or necessary implication, limit the right of eligibility, the chief of which must be considered.

## II.

### CAUSES OF DISQUALIFICATION.

§ 68. **In general, with Subdivisions.**—The disability to hold a public office may arise from a variety of causes. Thus a person may be disqualified by—

1. Mental incapacity ;
2. Insufficient age ;
3. Sex ;
4. Lack of citizenship ;
5. Holding prior office ;
6. Criminal character ;
7. Property qualifications ;
8. Insufficient residence ;
9. Want of professional attainments ;
10. Preference given to veteran soldiers ;
11. Requirement of civil service examination.

Each of these will be separately considered.

#### 1. *Mental Incapacity.*

§ 69. **Idiot or insane Person ineligible.**—From the very nature of the case, an idiot or other person *non compos mentis* is

<sup>1</sup>State v. Covington, 29 Ohio St. 103; Darrow v. People, 8 Colo. 417.

v. Murray, 28 Wis. 96, 9 Am. Rep. 439.

<sup>2</sup>State v. Smith, 14 Wis. 497; State

<sup>3</sup>Darrow v. People, *supra*.

incapable of accepting or holding a public office, and the constitutions of some States so declare.<sup>1</sup>

§ 70. *Ability to read and write may be required.*—In some of the States ability to read and write is necessary to eligibility,<sup>2</sup> and such a requirement may lawfully be made, where there is no constitutional prohibition,<sup>3</sup> as there is in Alabama.<sup>4</sup>

## 2. *Insufficient Age.*

§ 71. *What Offices may be held by Infants.*—Offices where judgment, discretion and experience are essentially necessary to the proper discharge of the duties they impose, can not be held by infants. But where the duties to be performed are ministerial merely, requiring nothing more than skill and diligence, an infant, otherwise competent, may be the officer.<sup>5</sup>

Thus, an infant can not be a judge,<sup>6</sup> or a justice of the peace,<sup>7</sup> or a burgess,<sup>8</sup> or a juror,<sup>9</sup> or a clerk of court;<sup>10</sup> but he may, at common law, hold the office of notary public,<sup>11</sup> or act as a special deputy sheriff,<sup>12</sup> or as a register<sup>13</sup> or as a captain in the army.<sup>14</sup>

§ 72. *Constitutional Limitations as to Age.*—It is common for the constitution of the States as of the United States to require the attainment of a certain age to render one eligible to offices of importance. Thus the constitution of the United States provides that no person shall be eligible to the office of president who shall not have attained the age of thirty-five years,<sup>15</sup> nor

<sup>1</sup> No insane person or idiot can, by the constitutions of Georgia, Alabama and Louisiana, hold any State office. Stimson's Am. Stat. Law. § 223.

<sup>2</sup> As in New Mexico, L. 1889, c. 13, p. 18; Arizona Act of March 21, 1889.

<sup>3</sup> State v. Covington, 29 Ohio St. 102.

<sup>4</sup> Stimson's Am. Stat. Law, § 222.

<sup>5</sup> Moore v. Graves, 8 N. H. 408; Golding's Petition, 57 N. H. 146, 24 Am. Rep. 66.

<sup>6</sup> Scambler v. Waters, Croke Eliz.

636; Coke Litt. 3, b and note 15. T. Jones, 127; 2 Lev. 245.

<sup>7</sup> Golding's Petition, 57 N. H. 146, 24 Am. Rep. 66.

<sup>8</sup> Rex v. Carter, Cowp. 220.

<sup>9</sup> Coke, Litt. 157 a.

<sup>10</sup> United States v. Bixby, 9 Fed. Rep. 78.

<sup>11</sup> Claridge v. Evelyn, 5 B. & Ald. 81.

<sup>12</sup> Moore v. Graves, 8 N. H. 408.

<sup>13</sup> Young v. Stoell, 4 Croke, 279; Young v. Fowler, 4 Croke, 555.

<sup>14</sup> See Hands v. Slaney, 8 D. & R. 578.

<sup>15</sup> Art. II. Sec. 1, subdiv. 5.

senator until he shall have attained the age of thirty years,<sup>1</sup> nor representative in Congress until he shall have attained the age of twenty-five years.<sup>2</sup>

So it is not uncommon to provide that persons who have passed a certain age shall not be eligible to given offices, as that no person shall hold the office of judge who is over the age of seventy years.<sup>3</sup>

### 3. *Sex.*

§ 73. **Women generally not eligible.**—As a general rule, women, though citizens in the broad and most comprehensive sense, are not possessed of any political power, and cannot, in the absence of an enabling provision, be considered eligible to public office.<sup>4</sup> “By the law of England,” says Chief Justice GRAY,<sup>5</sup> “which was our law from the first settlement of the country until the American Revolution, the crown, with all its inherent rights and prerogatives, might indeed descend to a woman or to an infant; but, under the degree of a queen, no woman, married or unmarried, could take part in the government of the State. Women could not sit in the House of Commons or the House of Lords, nor vote for members of Parliament.<sup>6</sup> They could not take part in the administration of justice, even as judges or jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy.”<sup>7</sup>

<sup>1</sup> Art. I, Sec. 3, subdiv. 3.

<sup>2</sup> Art. I, Sec. 2, subdiv. 2.

<sup>3</sup> A constitutional provision that no person shall hold the office of judge of any court after he has attained the age of seventy years does not apply to justices of the peace. *Keniston v. State*, 68 N. H. 37, 56 Am. Rep. 486. But *contra*, under New York statute, *People v. Mann*, 33 Hun (N. Y.) 440. A surrogate in New York is not a judge or justice within the prohibition of such a provision. *People v. Carr*, 100 N. Y. 236, 53 Am. Rep. 161.

<sup>4</sup> *Bouvier's Law Dictionary*, title “Women;” *Robinson's case*, 181 Mass.

376, 41 Am. Rep. 239; *Minor v. Happersett*, 21 Wall. (U. S.) 162, *Bradwell v. Illinois*, 16 Wall. (U. S.) 130; *Wheeler v. Hall*, 6 Allen (Mass.) 558; *Jackson v. Phillips*, 14 Allen (Mass.) 539. Women can not hold the office of jailer in Kentucky. *Atchison v. Lucas*, 83 Ky. 451.

<sup>5</sup> In *Robinson's case*, 181 Mass. 376, 41 Am. Rep. 239.

<sup>6</sup> Citing 4 Inst. 5; *Countess of Rutland's case*, 6 Rep. 53 b; *Chorlton v. Lings*, L. R. 4 C. P. 374, 391, 392.

<sup>7</sup> Citing 2 Inst. 119, 121; 3 Bl. Com. 362; 4 *Id.* 395; *WILLER, J.*, in L. R. 4 C. P. 390, 391.

Thus it has been held that a woman could not hold the office of a justice of the peace,<sup>1</sup> nor, generally, the *quasi* public office of an attorney at law.<sup>2</sup>

On the other hand, it has been said by the same court that "the common law of England, which was our law upon the subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such that a woman was competent to perform them," and hence that a woman is eligible, in Massachusetts, to be a member of a school committee.<sup>3</sup> So women have frequently held the office of postmaster, and, in some instances, of pension agent,<sup>4</sup> and certain administrative offices which could be executed by a deputy.<sup>5</sup>

<sup>1</sup> Opinion of Judges, 107 Mass. 604.

<sup>2</sup> *Mechem on Agency*, § 804. *Robinson's case*, 131 Mass. 376, 41 Am. Rep. 239; *In re Leonard*, 12 Oreg. 93, 58 Am. Rep. 338. But see *contra* *Matter of Hall*, 50 Conn. 131, 47 Am. Rep. 625; *Matter of Goodell*, 48 Wis. 693.

<sup>3</sup> Opinion of Judges, 115 Mass. 602.

<sup>4</sup> See per PARK, C. J. in *Matter of Hall*, 50 Conn. 131, 47 Am. Rep. 625.

<sup>5</sup> "The office of sheriff," says GRAY, C. J. in *Robinson's case*, 131 Mass. 376, 41 Am. Rep. 239, "was partly judicial and partly ministerial; the judicial functions could not be delegated, but the ministerial duties, including that of attendance upon the judges, might be performed by deputy. *Dalton's Sheriff*, chs. 1, 4; *Bandal's case*, Noy 21; *Bacon's Use of the Law*, 4 *Bacon's Works*. (Ed. 1803) 97; *WILLES, J.*, in *L. R. 4 C. P.* 390. When such an hereditary office descended to a woman she might exercise the office by deputy (at least with the approval of the crown), but not in person; nor could it be originally granted to any woman because of her incapacity of executing public offices. *Duke of Buckingham's case*,

*Jenk. Cent.* 6 pl. 14; *a. c. Dyer*, 235 b. pl. 39; *Kellw.* 17; 4 *Inst.* 128; *Coke Litt.* 107 b. 165 a; *Case of the Great Chamberlain of England*, 2 *Bro. P. C.* (3d ed.) 146, *a. c.* 36 *Lords Journal* 302. Women were permitted to hold the office of keeper of a castle or jail, governor of a workhouse, forester or constable, for the reason that each of those offices might be executed by a deputy. *Lady Russell's case*, *Cro. Jac.* 17, 2 *Inst.* 382; *Anon.* 2 *Ld. Raym.* 1014, *a. c.* 3 *Salk.* 2, 4 *Inst.* 311; 2 *Hawk. ch. 10*, § 37; *WILLES, J.*, in *L. R. 4 C. P.* 389. They were decided to be capable of voting for and of being elected to the office of sexton of a parish upon the ground that this was not an office that concerned the public. *Olive v. Ingram*, 2 *Stra.* 1114, *a. c.* *Vin. Abr. Feme A.* pl. 7, 8; 7 *Mod.* 263, 273, 274. And we are not aware of any public office, the duties of which must be discharged by the incumbent in person, that a woman was adjudged to be competent to hold without express authority of statute, except that of overseer of the poor, a local office of an administrative character, in no way connected

It is, of course, competent for the people by their State constitutions, or by their legislatures where no constitutional prohibition intervenes, to remove these disabilities, and such is the constant tendency.<sup>1</sup>

#### 4. *Lack of Citizenship.*

§ 74. **Aliens can not hold Office.**—It is a general principle that an alien can not hold a public office.<sup>2</sup> In all independent, popular governments, as is said by Chief Justice DIXON of Wisconsin, “it is an acknowledged principle, which lies at the very foundation, and the enforcement of which needs neither the aid of statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens for their liberty and protection, and that it is to be administered, and its powers and functions exercised only by them and through their agency.”<sup>3</sup>

In accordance with this principle it is held that an alien can not hold the office of sheriff.<sup>4</sup>

§ 75. **Restriction to “Inhabitant” or “Voter.”**—Where by law, an “inhabitant” of a certain district is eligible to office within it, one who is such an inhabitant may hold such an office although he may not be a “citizen.” The words “inhabitant” and “citizen,” when so used, are not necessarily synonymous.<sup>5</sup> So where a “voter” or “elector” may hold an office under the State, he is not disqualified by not being a citizen of the United States.<sup>6</sup>

#### 5. *Holding Prior Office.*

§ 76. **Constitutional Prohibitions.**—For various reasons of

with judicial proceedings. *The King v. Stubbs*, 2 T. R. 895.”

A woman may hold a deputy clerkship in Colorado. *Jeffries v. Harrington*, — Colo. — 17 Pac. Rep. 505.

<sup>1</sup> *Huff v. Cook*, 44 Iowa, 639. Under a statute that no person shall be precluded or debarred from any occupation, profession or employment on account of sex, a woman may be a master in chancery.

*Schuchardt v. People*, 99 Ill. 501, 39 Am. Rep. 84.

<sup>2</sup> *State v. Smith*, 14 Wis. 497; *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489.

<sup>3</sup> In *State v. Smith*, 14 Wis. 497.

<sup>4</sup> *State v. Smith*, 14 Wis. 497; *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489.

<sup>5</sup> *State v. Kilroy*, 86 Ind. 118.

<sup>6</sup> *McCarthy v. Froelke*, 63 Ind. 507.



public policy it is frequently provided in state constitutions that a person holding one office shall not be eligible to certain others deemed to be inconsistent or incompatible with the one already held. Thus, as in the constitution of California, it is sometimes declared that "no person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under this State;"<sup>1</sup> or, as in Indiana, "that no person elected to any judicial office shall, during the term for which he was elected, be eligible to any office of trust or profit under the State, other than a judicial one;"<sup>2</sup> or, as in Louisiana, that more than one office of trust,<sup>3</sup> or, as in Indiana, more than one lucrative office, shall not be held at the same time;<sup>4</sup> or, as in Vermont, "that no person holding any office of profit or trust under the authority of Congress, shall be eligible to any appointment in the legislature, or of holding any executive or judiciary office under this State;"<sup>5</sup> or, as in Mississippi, that "no senator

<sup>1</sup> This provision refers to the capacity to hold as well as to be elected to office, and consequently a person who was duly eligible and elected to a civil office of profit under the State can no longer hold that office after he has accepted and is in the incumbency of a lucrative federal office. *People v. Leonard*, 73 Cal. 280, 14 Pac. Rep. 858. An inspector of customs, with a salary of one thousand dollars per year, holds a lucrative office, and is hence ineligible to the office of school superintendent when the latter is an office of profit. *Crawford v. Dunbar*, 53 Cal. 86.

The same provision is found in Nevada. *State v. Clarke*, 3 Nev. 566.

<sup>2</sup> Under this provision, one elected with his consent, to a judicial office, but who does not accept the office, may, under Indiana constitution, § 176, be afterwards elected to an office, not judicial, the term of which will run during the judicial term to which he was elected. *Smith v. Moore*, 90 Ind. 294. Where the term of a justice of the peace expired at midnight

of the 16th of a month he was held to be ineligible to the office of township trustee which began on the same day. *Vogel v. State*, 107 Ind. 374.

<sup>3</sup> Where the constitution forbids the holding of more than one office of trust at the same time, the legislature can not defeat it by making the incumbent of one office *ex officio* the incumbent of the other. *Bouanchaud v. De Hebert*, 21 La. Ann. 188.

<sup>4</sup> Offices of county recorder and county commissioner are lucrative offices within the meaning of the constitution. *Dalley v. State*, 8 Blackf. (Ind.) 329. The office of colonel of volunteers and the office of reporter of supreme court decisions are lucrative offices, and can not both be held by the same person, *Kerr v. Jones*, 19 Ind. 351. But office of councilman in a city, though lucrative in the ordinary sense, is not a lucrative office within this provision, as it is not a state office. *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 289.

<sup>5</sup> Office of postmaster is an office of trust and profit under the authority of

or representative shall be appointed to any civil office of profit under this State.”<sup>1</sup>

## 6. Criminal Practices.

§ 77. By engaging in Duel.—The constitution of Virginia provides that “no person who, while a citizen of this State, has since the adoption of this constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, either within or beyond the boundaries of this State, or knowingly conveyed a challenge, or aided or assisted in any manner in fighting a duel, shall be allowed to vote or hold any office of honor, profit or trust under this constitution.” Under this provision it was held that one who had been so engaged may be removed from office by *quo warranto* without a previous conviction of the offense in criminal proceedings.<sup>2</sup>

But in Kentucky where the constitution provides that such an offender “shall be deprived of the right to hold any office, post or trust under the authority of the State,” it was held that a person willing to take the requisite oath upon entering the office could not be proceeded against until he had been tried and convicted of the offense.<sup>3</sup>

Provisions of this nature are found in other States, and are within the constitutional power of the State legislatures.<sup>4</sup>

Congress, and a justice of the peace holds a judiciary office, and both can not therefore be held by the same person. *McGregor v. Balch*, 14 Vt. 429, 39 Am. Dec. 281.

<sup>1</sup> Office of levee commissioner is a civil office under the state, and can not be held by a member of the legislature. *Shelby v. Alcorn*, 36 Miss. 272, 72 Am. Dec. 169.

The constitutions of the several States prescribe a great many disqualifications of this nature, which are too extensive to be given here. They may be found in *Stimson's Am. Stat. Law*, § 220.

<sup>2</sup> *Royall v. Thomas*, 28 Gratt. (Va.) 120, 26 Am. Rep. 335. See also *Mose-*

*ley v. Moss*, 6 Gratt. (Va.) 584; *Brooks v. Calloway*, 12 Leigh (Va.) 466.

<sup>3</sup> *Commonwealth v. Jones*, 10 Bush (Ky.) 725. See also *Morgan v. Vance*, 4 Bush (Ky.) 323.

<sup>4</sup> *Barker v. People*, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322. See also *Anderson v. State*, 72 Ala. 187; *State v. Buckman*, 18 Fla. 267; *Barker v. People*, 20 Johns. (N. Y.) 457.

The constitutions of the various States contain many other provisions disqualifying for the commission of crimes therein specified. These are too extensive to be summarized here, but they will be found in *Stimson's Am. Stat. Law*, § 223.

§ 78. **By Bribery or Fraud.**—The constitution of Pennsylvania provides that “any person who shall, while a candidate for office, be guilty of bribery, fraud or willful violation of any election law, shall be forever disqualified from holding any office of trust or profit in this Commonwealth.” Under this provision, it was held that the word “guilty” was used in its ordinary or popular signification, and that it was not necessary that the offender should have been convicted of the offense before proceedings were begun for his removal.<sup>1</sup>

§ 79. **By being a Defaulter.**—It is provided by the constitution of Illinois that any person who has been a collector or holder of public moneys, and shall not have accounted for and paid them over according to law, shall be ineligible to any office of profit or trust. Under this provision it was held that while it might be that if such a defaulter should be elected or appointed, and enter into office, he could be ousted by *quo warranto*, yet that until his default was judicially ascertained, his acts as such officer would be valid and binding, and his sureties would be liable for them.<sup>2</sup>

Provisions similar to that of Illinois are found in several of the States.<sup>3</sup>

§ 80. **By engaging in Rebellion.**—It is also a somewhat common provision that no person who has voluntarily borne arms or engaged in rebellion against the United States shall be eligible to office, and such an act constitutes a complete disability until removed.<sup>4</sup>

## 7. *Property Qualifications.*

§ 81. **Property Qualifications may be required.**—It is not infrequently provided, especially in municipal offices, that he only shall be eligible to certain offices who is a freeholder, tax-payer and the like, and such a provision, where it does not conflict with any constitutional guaranty, will be enforced.<sup>5</sup>

<sup>1</sup> Commonwealth v. Walter, 83 Penn. St. 105, 24 Am. Rep. 154. See State v. Humphreys, — Tex. —, 12 S. W. Rep. 99.

<sup>2</sup> Cawley v. People, 95 Ill. 249.

<sup>3</sup> See Brady v. Howe, 50 Miss. 607; Taylor v. Governor, 1 Ark. 21; Pucket v. Bean, 11 Heisk. (Tenn.) 600.

<sup>4</sup> Privett v. Bickford, 26 Kans. 52, 40 Am. Rep. 301; State v. Watkins, 21 La. Ann. 631; Hudspeth v. Garriques, 21 La. Ann. 684.

<sup>5</sup> Darrow v. People, 8 Colo. 417. A negative provision that “no person, except a qualified elector, shall be elected or appointed to any civil or

In some of the States, however, property qualifications are prohibited by the constitution.<sup>1</sup>

### 8. *Insufficient Residence.*

§ 82. **Period of Residence usually required.**—It is a common, if not an invariable, requirement that candidates for public office shall for some period have been residents of the district or locality to be represented.

Under such a provision in Nebraska it is held that the period required must be complete before the election, and that it is not sufficient that it has matured before the commencement of the term,<sup>2</sup> and the same rule prevails in Minnesota.<sup>3</sup>

### 9. *Want of Professional Attainments.*

§ 83. **Necessary professional Attainments may be required.**—So there are certain offices which can be properly filled only by persons possessing peculiar fitness or professional attainments, and it is common, in the laws creating the office, to require that the incumbent shall possess such qualifications. And though no written law requires it, such necessity may be deduced from the established custom or the evident necessity of the case. Thus it has been held that no person, who has not previously been admitted to practice as an attorney at law, is eligible to the office of prosecuting attorney.<sup>4</sup>

### 10. *Preference to Veteran Soldiers.*

§ 84. **Such Preference may be enforced.**—It is provided in

military office in the state," does not conflict with a provision which requires a supervisor or alderman to be also a tax-payer. *Id.*

<sup>1</sup> The constitution so provides in Minnesota, Kansas, Delaware, North Carolina, South Carolina, California, Alabama and Mississippi. Stimson's Am. Stat. Law, § 223.

<sup>2</sup> *State v. McMillen*, 23 Neb. 385, 36 N. W. Rep. 587.

<sup>3</sup> *Parker v. Smith*, 3 Minn. 240, 74 Am. Dec. 749.

<sup>4</sup> *People v. May*, 8 Mich. 598.

So no minister or preacher of any religious denomination can be a member of the legislature in Maryland, Delaware, Kentucky or Tennessee, or be governor in Kentucky, or hold any civil office in Delaware. Stimson's Am. St. Law, § 223, sub. I.

New York that "in every public department and upon all public works of the state of New York, and of the cities, towns and villages thereof, and also in non-competitive examinations under the civil service laws, rules or regulations of the same, whenever they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment. Age, loss of limb or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved."<sup>1</sup> Provisions similar to this are found in other States,<sup>2</sup> and are enforced by the courts in proper cases.<sup>3</sup>

§ 85. But not where it conflicts with constitutional Powers.—Such a requirement, however, can not, it is held, operate to destroy the right of selection of his subordinates which the constitution has confided to a superior officer.<sup>4</sup>

### 11. Civil Service Examination.

§ 86. Statutory Provisions for Examination.—Statutes have also been enacted, notably in New York, having for their purpose the improvement of the civil service, and requiring that no person shall be appointed to public offices of certain grades until he has passed an examination intended to ascertain his fitness. Where no constitutional prohibitions intervene, laws of this nature are valid, and will be enforced.<sup>5</sup>

<sup>1</sup> Laws 1887, ch. 464.

<sup>2</sup> See Opinion of Judges, 145 Mass. 587, 13 N. East Rep. 15.

<sup>3</sup> People v. Adams, 6 N. Y. Supplement, 128; People v. French, 5 *Id.* 712; People v. Adams, 4 *Id.* 522; *In re Wortman*, 2 *Id.* 324.

<sup>4</sup> People v. Durston, 3 N. Y. Supplement 523; People v. Angle, 109 N. Y. 564, 17 N. East Rep. 413.

<sup>5</sup> See Peck v. City of Rochester, 8 N. Y. Supplement 872; Rogers v. City of Buffalo, 2 *Id.* 326.

In Peck v. Rochester, *supra*, ANGLE, J., says: "Civil service examina-

tions, as a prerequisite to entering upon the duties of office, appear to have been known to the common law of England more than 500 years ago. In the city of London, in a tower which is thought to have been one of the earliest portions of Westminster Abbey, is a room where there are 6 horse shoes and 61 nails, which, by ancient custom, the Sheriffs of London were compelled to count when they were sworn in. In the time of Edward II., when this custom was established, (1308-1327), it was a proof of education, as only

§ 87. **Cannot defeat constitutional Discretion.**—But provisions of this nature can not operate to defeat the right to select his own subordinates according to his discretion, which the constitution has conferred upon a superior officer, as a superintendent of public works, and so far as they conflict with such constitutional right, these laws are unconstitutional and void.<sup>1</sup>

§ 88. **Statute prescribing Qualifications is directory merely.**—It has been held that a statute prescribing qualifications to an office is merely directory, and although an appointee does not possess the requisite qualifications, his appointment is not therefore void, unless it is expressly so enacted.<sup>2</sup>

### III.

#### REMOVAL OF DISABILITY.

§ 89. **Effect of Removal of Disability before Term begins.**—What effect shall be given to a removal of the disability after the election or appointment but before the term begins is a question upon which the authorities are in conflict.

In a recent case in Indiana<sup>3</sup> it appeared that one Smith had been elected justice of the peace in April, 1878, for a term of four years, ending November 29, 1882. In April, 1882, he was re-elected for another term but refused to accept or qualify. On

well instructed men could count up to 61. At the same time, it was ordained that the sheriff, in proof of his strength, should cut a bundle of sticks. The custom (the abolition of which has been vainly attempted) still exists, but a bundle of matches is now provided. The original knife is always used. 2 Hare. Walks in London (N. Y. Ed. 1878) 272, 278. To secure the theological qualifications of the sheriff, they were required, not only to take the oaths of allegiance and supremacy, as well as the statutory oath of office, but to make a declaration against transub-

stantiation, and to receive the sacrament within three months after entering upon office, in the presence of two witnesses and one church warden, and get a certificate that they had done so, signed by the minister and one church warden, and the two witnesses must also make affidavit of the fact. 14 Peterd. Abr. (N. Y. Ed. 1881) 429, note."

<sup>1</sup> People v. Angle, 109 N. Y. 564; People v. Durston, 8 N. Y. Supplement, 522.

<sup>2</sup> St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am. Dec. 855.

<sup>3</sup> Smith v. Moore, 90 Ind. 294.

November 7, 1882, and while he was still serving under his first election, he and one Moore were candidates for the office of county treasurer for the term beginning August 15, 1883, and Smith received a majority of the votes and, if eligible, was elected. The constitution of Indiana provides that "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the State other than a judicial office." Under this provision it was claimed that Smith, being a judicial officer at the time of the election, was ineligible to the office of county treasurer, and the court below so held, and Smith appealed. It was contended on the part of Smith, the appellant, that the ineligibility refers to the capacity to *hold* the office and not merely to the right to be elected to it, and that the appellant's incapacity was removed by the expiration of his term as justice several months before his term as treasurer would begin. In deciding the case, the court say: "After a careful and full examination, we have reached the conclusion that the position of appellant is the correct one in this case, and that the court below erred in its conclusions of law, so far as they relate to the ineligibility of appellant.

'Legally qualified' is the meaning that should be given to the word eligible, as used in the section of the constitution under consideration.

'Office' has been defined to mean public employment, and its legal meaning to be, an employment on behalf of government in any station of public trust; a place of trust, by virtue of which a person becomes charged with the performance of certain public duties.' With this definition of the words 'eligible' and 'office,' the constitutional provision may be read as follows: No person elected to any judicial office shall, during the term for which he shall have been elected, be legally qualified to be employed on behalf of government in any station of public trust, other than a judicial office. In other words, be legally qualified as an officer, to perform the duties of a public office, other than judicial. \* \* \*

When appellant entered upon his term as justice of the peace on the 29th day of November, 1878, he became, during the con-

<sup>1</sup> Citing 5 Waits Actions and Defenses, p. 1 *et seq.*

tinuance of that term, disqualified to hold and perform the duties of any public office except a judicial one. But while he could not, during that term, hold or perform the duties of a public office other than judicial, it does not follow that he might not, during that term, be legally voted for and chosen to an office, the term of which would not begin until after the expiration of the judicial term as justice."<sup>1</sup>

§ 90. *Same Subject—Wisconsin Cases.*—So in a leading case in Wisconsin<sup>2</sup> it appeared that one Schuet was, if eligible, duly elected on the 8th day of November, 1870, to the office of clerk of the board of supervisors for the term of two years to commence on the first Monday in January, 1871. At the time of the election, he was duly qualified for the office except that he was an alien and had not declared his intention to be a citizen of the United States. The supreme court had previously held that an alien could not hold office in Wisconsin.<sup>3</sup> In the present case, however, Schuet's disability was duly removed, by proper proceedings six days after the election, and it was contended that, notwithstanding the previous decision, he was now eligible to assume and hold the office when the term arrived.

"The precise question under consideration, is," said LYON, J., "a new one, and we are left free to decide it upon what we deem to be sound principles. We have already seen that the grounds upon which a person not an elector is excluded from holding public office is, that the powers, and functions of a free and independent government must be exercised by those by whom such government was instituted, that is, by the electors thereof. So if a person who is not an elector attempts to exercise the functions of a public office, the courts, upon proper proceedings being instituted for that purpose, will oust him. This is one thing. But to hold that a person qualified to hold such office when the term for which he was elected commences, is dis-

<sup>1</sup> ELLIOTT, J., dissented. For earlier cases in Indiana upon this and cognate subjects see *Waldo v. Wallace*, 12 Ind. 569; *Gulick v. New*, 14 Ind. 28, 77 Am. Dec. 49; *Carson v. McPhetridge*, 15 Ind. 327; *Jeffries v. Rowe*, 63 Ind. 592; *Howard v. Shoe-*

*maker*, 35 Ind. 111; *Reynolds v. State*, 61 Ind. 392; *State v. Bieler*, 87 Ind. 320. See also *Vogel v. State*, 107 Ind. 374.

<sup>2</sup> *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489.

<sup>3</sup> *State v. Smith*, 14 Wis. 497.



qualified merely because he was not an elector when he was elected, two months before, is another and very different thing.

What then is the nature and effect of the disqualification under consideration? In my judgment it is not that a person who is not an elector only because of some disqualification which he has the power to remove at any time, is thereby rendered ineligible *to be elected* to a public office for a term which is to commence at a future time; but it is that a person thus disqualified shall not be eligible *to hold* such office. Such disqualification does not relate to the *election to* but to the *holding of*, the office. I think this principle is substantially asserted in Cushing's Law and Practice of Legislative Assemblies. Section 78 is to the effect that in cases where the disqualification is not derived from the personal character of the individual, or inflicted by way of punishment, and where it is that the individual 'shall be incapable of holding' the office, until the disqualification is removed, this does not render him incapable of being elected, but only prevents him from exercising the functions of the office until it is removed."<sup>1</sup>

§ 91. **Same Subject—Kansas Cases.**—The same result was also reached in Kansas<sup>2</sup> under a provision of the constitution that no person who had voluntarily borne arms against the government of the United States should be qualified "to hold office" in the state, until such disability should be removed. At the time of the election plaintiff labored under this disability, but before the returns were canvassed, the disability had been removed, and the question was as to plaintiff's right to the office.

"Upon this question," says the court by HERRON, C. J., "the

<sup>1</sup> And the same result was reached in the subsequent case of *State v. Trumpf*, 50 Wis. 103. But in this case *RYAN*, C. J., while concurring in the opinion on the ground of *stare decisis*, said "I regret the rule in *State v. Murray*, 28 Wis. 96 (9 Am. Rep). I think it would have been more in accord with the doctrine of *State v. Smith*, 14 Wis. 497, and with principle, to have held that one receiving votes for office should then

be eligible, so that the validity or invalidity of the votes should not be dependent on subsequent accident, but should then, so to speak, attach to him. I cannot but think the distinction taken in that case between eligibility to election to office and eligibility to hold office too nice to enter into a rule of judicial decision."

<sup>2</sup> *Privett v. Bickford*, 26 Kana. 53, 40 Am. Rep. 301.

weight of authority seems to be, and in our opinion it is the better doctrine, that where the disability concerns the holding of the office, and is not merely a disqualification to be elected to an office, a person who is ineligible at the election will be entitled to enter upon and hold the office, if his disability be removed or cured before the issuance of the certificate, and before entering upon the discharge of the duties of the office for which he is elected."

§ 92. *Same Subject—Other similar Considerations.*—So it has been held in Iowa<sup>1</sup> that the right to hold an elective office may be conferred upon a woman even by a retrospective statute passed to confirm her election, and the fact that, before the statute was passed, an inferior court had declared her to be ineligible would not deprive her of the office.

Under this view disabilities in age or residence at the time of the election would not incapacitate if they were removed before the term of office began.<sup>2</sup>

Under such a constitutional provision as that in Indiana, however, a judicial officer can not, "during the term for which he shall have been elected," remove his disability by resigning the office.<sup>3</sup>

§ 93. *Same Subject—The contrary View.*—But the contrary view as to the meaning of the word "eligible" has also been adopted. Thus the constitution of California provided that "no person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under the State." One Grow was a candidate for election to the office of sheriff, and, if eligible, was elected. At the time of the election he held the office of postmaster, but he resigned this office and qualified as sheriff before the term of sheriff began. In a contest over the office it was contended for Grow that under the constitutional provision he was only forbidden to take a civil state office while so holding the other, and that he

<sup>1</sup> *Huff v. Cook*, 44 Iowa, 689.

<sup>2</sup> *Waldo v. Wallace*, 12 Ind. 570;

<sup>3</sup> *State v. Murray*, 29 Wis. 96, 9  
Am. Rep. 489. But *contra* see *Searcy*  
*v. Grow*, 15 Cal. 117; *Parker v.*  
*Smith*, 3 Minn. 240.

*Gullick v. New*, 14 Ind. 93, 77 Am.  
Dec. 49.

was capable of receiving votes cast for him so as to give him a right to take the state office upon or after resigning the Federal office. But the court said:<sup>1</sup> "We think the plain meaning of the words quoted is the opposite of this construction. The language is not that the Federal officer shall not *hold* a state office while he is such Federal officer, but that he shall not, while in such Federal office, be *eligible* to the state office. We understand the word 'eligible' to mean capable of being chosen,—the subject of selection or choice. The people in this case were clothed with this power of choice; their selection of the candidate gave him all the claim to the office which he has; his title to the office comes from their designation of him as sheriff. But they could not designate or choose a man not eligible, *i. e.*, not capable of being selected. They might select any man they chose, subject only to this exception, that the man they selected was capable of taking what they had the power to give."

And the same construction was adopted in Nevada under a constitutional provision in the same words, and the court went further, saying: "But instead of restricting the meaning of the word 'eligible,' as defendant contends, we think, to carry out the intention of the constitutional convention, we ought rather to give it a more extended signification than is generally given, and hold that it means both 'incapable of being legally chosen,' and 'incapable of legally holding.'"<sup>2</sup>

So in Minnesota under a statute requiring residence in the state for a certain period in order to be eligible to office, the court said: "This qualification of residence should be consummate at the time of the election, and it will not do that the period of probation is completed before the party qualifies or enters upon the duties of the office;"<sup>3</sup> and the same ruling has been made in Nebraska.<sup>4</sup>

§ 94. *Disability arising after Election.*—The effect of a disability arising after the election will be considered in a subsequent section.

<sup>1</sup> *Searcy v. Grow*, 15 Cal. 117, and to the same effect see *Miller v. Board*, 25 Cal. 98; *People v. Sanderson*, 80 Cal. 160; see also *People v. Leonard*, 78 Cal. 280.

<sup>2</sup> *State v. Clarke*, 3 Nev. 566.

<sup>3</sup> *Parker v. Smith*, 8 Minn. 240. 74 Am. Dec. 749.

<sup>4</sup> *State v. McMillen*, 23 Neb. 385, 86 N. W. Rep. 587.

## IV.

## CHANGES IN QUALIFICATIONS.

§ 95. **State vs. Federal.**—Under our political system, the State, within its province, is supreme, and the qualifications which it prescribes for those who shall be eligible to office under it, are conclusive, and can not be altered, added to, or defeated by Federal authority. So, on the other hand, no State can add to or in any manner change the qualifications prescribed by the constitution and laws of the United States for a Federal office.

§ 96. **Power of Legislature to affect constitutional Qualifications.**—Where the constitution has prescribed the qualifications, the possession of which shall entitle an individual to hold office under the state, it is not within the power of the legislature to change or add to them, unless such power be given to the legislature either in express terms or by necessary implication.<sup>1</sup>

A negative provision, however, as that a person not an elector shall not be appointed or elected to an office in the state, does not preclude the legislature from adding other reasonable and proper requirements.<sup>2</sup>

§ 97. **Where no constitutional Prohibition, Legislature may change Qualifications.**—Where, however, no constitutional prohibition intervenes, the legislature may fix the qualifications and may alter or add to them at pleasure.<sup>3</sup>

§ 98. **Legislature can not make political Opinions a Qualification.**—But under our republican form of government, the legislature can not make the holding of any particular political opinion a test of the right to hold office.<sup>4</sup> Thus an act which provides for the appointment of four officers "two members

<sup>1</sup> *Thomas v. Owens*, 4 Md. 189, 238; *Page v. Hardin*, 8 B. Mon. (Ky.) 648, 661.

<sup>2</sup> *State v. Covington*, 29 Ohio St. 103, 118, as that he shall be able to read and write the English language; *Darrow v. People*, 8 Colo. 417, or be a tax-payer.

<sup>3</sup> See *post*, § 465.

<sup>4</sup> *Attorney General v. Common Council*, 58 Mich. 213, 55 Am. Rep. 675; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108; *Baltimore v. State*, 15 Md. 376; *Brown v. Haywood*, 4 Helsk. (Tenn.) 857; *Evansville v. State*, 118 Ind. 426.

thereof to be from each of the two leading political parties" is unconstitutional and void.<sup>1</sup>

§ 99. Nor can religious Opinions be made a Test.—So it is well settled that religious beliefs or opinions can not be made a test of political rights and privileges.<sup>2</sup>

<sup>1</sup> Attorney-General v. Common Am. Rep. 103; Attorney-General v. Council, 58 Mich. 218, 55 Am. Rep. Common Council, 58 Mich. 218, 55 Am. Rep. 675.

<sup>2</sup> People v. Hurlbut, 24 Mich. 44, 9

## CHAPTER IV.

### OF APPOINTMENT TO OFFICE.

§ 100. Necessity of Appointment or Election.

101. Purpose of this Chapter.

102. What is meant by Appointment.

103. Where Power of Appointment lies.

104. Appointment to Office is an executive Act.

105. Exceptions to the Rule.

106. What Power of Appointment may be exercised by the Legislature.

107. Same Subject—Power to prescribe Manner of Appointment not equivalent to Power to appoint.

108. Authority of Executive to appoint must be conferred by sovereign Power.

109. Power which created Authority can take it away.

110. Power may be absolute or conditional.

111. At what Time the Power may be exercised.

112. Can not appoint himself to an Office.

113. Power once exercised is exhausted till Vacancy occurs.

114. What constitutes Appointment.

115. Necessity of written Appointment.

116. Same Subject—The contrary View.

117. Commission is Evidence merely.

118. When Commission issues.

119. Commission may be revoked if improperly issued.

§ 120. Appointment in other Cases is irrevocable.

121. Under what Circumstances appointing Power may be exercised.

#### I. ORIGINAL APPOINTMENTS.

122. More frequently exercised under National than State Governments.

123. Local Offices can not be permanently filled by Legislative Appointment.

124. Discretion of appointing Power.

#### II. APPOINTMENTS TO FILL VACANCIES.

125. Power may exist in two Classes of Cases.

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127. Classification of Vacancies.

128. Whether Office filled by prior Incumbent holding over is vacant.

129. Whether Failure to elect leaves Office vacant.

130. Whether Failure to qualify causes Vacancy.

131. Whether election of unqualified Person causes Vacancy.

132. Whether newly-created Office is vacant.

133. When Vacancies anticipated may be filled.

134. Appointments "by and with the Advice and Consent of the Senate."

135. Appointments to fill Vacancies occurring in Offices originally filled by Senate.

§ 186. Appointments to fill Vacancies occurring during Session, but left unfilled.

187. Same Subject—Rule in United States Courts.

§ 188. Same Subject—Rule in New Jersey.

189. Same Subject — Appointee holds only until Close of next Session.

§ 100. **Necessity of Appointment or Election.**—In a leading case in Michigan, it is said, “It is difficult to perceive by what process a public office can be obtained or exercised without either election or appointment. The powers of government are parceled out by the constitution, which certainly contemplates some official responsibility. Every officer not expressly exempted is required to take an oath of office as a preliminary to discharging his duties. It is absurd to suppose that any official power can exist in any person by his own assumption, or by the employment of some other private person ; and still more so, to recognize in such an assumption a power of depriving individuals of their property. Such claims are inconsistent with any idea of government whatever. And it is plain that the exercise of such a power is an act in its nature public and not private.”<sup>1</sup>

§ 101. **Purpose of this Chapter.**—It is the purpose of this chapter to discuss the question of appointment to office, reserving the question of election for the following chapter.

§ 102. **What is meant by Appointment.**—By *appointment*, as here used, is meant the act of designation by the executive officer, board or body, to whom that power has been delegated, of the individual who is to exercise the functions of a given office. In this use it is to be distinguished from the selection or designation by a popular vote.

§ 103. **Where Power of Appointment lies.**—The power of appointing public officers rests primarily with the people. By their constitutions, however, they delegate it to their representatives, and we find it usually vested in the chief executive of the nation, state or municipality by which the officer's authority is created, but it is sometimes conferred upon legislatures, boards, committees or councils. The Constitution of the United

<sup>1</sup> CAMPBELL, J., in *Ames v. Port Huron Log-Driving Co.*, 11 Mich. 139, 88 Am. Dec. 781.

States provides<sup>1</sup> that the president "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law,"<sup>2</sup> and the constitutions of the states confer more or less of appointing power upon their respective governors.

§ 104. **Appointment to Office is an executive Act.**—So it is said that appointments to office, whether made by judicial, legislative or executive officers or bodies, are in their nature intrinsically executive acts,<sup>3</sup> though it by no means follows that the appointing power is inherent in the executive.

§ 105. **Exceptions to this Rule.**—For, as has been said, it must be conceded "that it is not every appointment to office which involves the exercise of executive functions; as, for instance, the appointments made by judicial officers in the discharge of their official duties, or the appointments made by the general assembly of officers necessary to enable it to properly discharge its duties as an independent legislative body, and the like. Such appointments by the several departments of the state government are necessary to enable them to maintain their independent existence, and do not involve an encroachment upon the functions of any other branch."<sup>4</sup>

§ 106. **What Power of Appointment may be exercised by the Legislature.**—Where the people have, by their constitutions, expressly conferred the power of appointment of other officers upon the legislature, it may properly and lawfully be exercised within the limits so prescribed. But in other cases than the two above mentioned,—those authorized by necessity and those expressly authorized by the constitution—it is clear that the legislature has, under our political systems, no unlimited appointing

<sup>1</sup> Art. II. sec. 2, subd. 2.

<sup>2</sup> *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 66; *Taylor v. Commonwealth*, 3 J. J. Marsh. (Ky.) 401; *Achley's case*, 4 Abb. Pr. (N. Y.) 35; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Heinlen v. Sullivan*, 64 Cal. 878; *Evansville v. State*, 118 Ind. 426; *State v. Denny*,

118 Ind. 382; *Hovey v. State*, 119 Ind. 386. *Contra*, *Mayor v. State*, 15 Md. 376, 74 Am. Dec. 572; *People v. Freeman*, 80 Cal. 238, 13 Am. St. Rep. 122; *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98, and cases there cited.

<sup>3</sup> *State v. Denny*, 118 Ind. 449, 21 N. E. Rep. 252.



power. Long practical construction of the constitution may, however, be deemed to confer appointing power,<sup>1</sup> and the legislature, in creating offices, may, it seems, where no constitutional prohibition intervenes, reserve to itself the power to appoint, or may delegate the power to other officers or bodies.<sup>2</sup>

One limitation upon this power is generally recognized, as will be seen hereafter,<sup>3</sup> namely, that it is not within the power of the legislature to take from the local authorities the right to make permanent appointments to fill purely local municipal offices.<sup>4</sup>

**§ 107. Same Subject—Power to prescribe Manner of Appointment not equivalent to Power to appoint.**—So where the constitution provides that all officers whose appointment is not otherwise provided for in the constitution shall be chosen in such manner as may be prescribed by law, it is held that, while this provision authorizes the legislature to provide by law for the appointment or election of such officers, it does not authorize the legislature itself to make such appointment or election.<sup>5</sup> To make good such a claim, it is said,<sup>6</sup> “it must be made to appear that the power to direct the ‘manner,’ the mode, the way, in which an act shall be done, and the power and authority to do the act itself, are one and the same thing. But that they are not identical or equivalent to each other is too clear for argument, and almost too clear to admit of illustration. To prescribe the manner of election or appointment to an office is an ordinary legislative function. To make an appointment to office is an administrative function. And under a constitution in which the philosophical theory of a division of the powers of government

<sup>1</sup> See elaborate discussions of these questions in *State v. Peele*, 121 Ind. 495; *State v. Hyde*, 121 Ind. 20; *Hovey v. State*, 119 Ind. 386; *Hovey v. State*, 119 Ind. 895; *State v. Denny*, 118 Ind. 449; *Evansville v. State*, 118 Ind. 426; *State v. Denny*, 118 Ind. 382.

<sup>2</sup> See *State v. Hyde*, 129 Ind. 296; *State v. Gorby*, 122 Ind. 17; *French v. Harley*, 141 Ind. 618, and other Indiana cases cited above; *People v. Morgan*, 90 Ill. 562; *State v. George*, 23 Ore. 142, 29 Am. St. Rep. 586; *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98; *State v. Boucher*, 8 N. Dak. 689; *State v. Constantine*, 42 Ohio St. 441, 51 Am. Rep. 683.

<sup>3</sup> See *post*, § 123.

<sup>4</sup> *State v. Denny*, 118 Ind. 449, 21 N.E. Rep. 252; *Evansville v. State*, 118 Ind. 426, 21 N.E. Rep. 267; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108; *People v. Detroit*, 28 Mich. 228; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *People v. Albertson*, 55 N.Y. 53; *People v. Porter*, 90 N.Y. 68. But, *contra*, see *State v. Smith*, 44 Ohio St. 348, and cases there cited.

<sup>5</sup> *State v. Denny*, 118 Ind. 382; *State v. Peele*, 121 Ind. 495; *Evansville v. State*, 118 Ind. 426. But see *Mayor v. State*, 15 Md. 376, 74 Am. Dec. 572.

<sup>6</sup> BRINKERHOFF, J., in *State v. Kennon*, 7 Ohio St. 560.

into legislative, executive and judicial should be exactly carried out in detail, the power of prescribing the manner of making appointments to office would fall naturally and properly to the legislative department, while the power to make the appointments themselves would fall as naturally and properly to the executive department."

And this disability extends as well to filling a vacancy as to making an original appointment.<sup>1</sup>

§ 108. **Authority of Executive to appoint must be conferred by sovereign Power.**—But, even though the act of appointing officers may be deemed executive in its nature, the power to appoint officers, excepting, perhaps, those who are to assist him in the discharge of his personal executive duties, is not inherent in the chief executive, but must exist, if it exist at all, by virtue of the authority conferred upon him by the sovereign power.<sup>2</sup>

§ 109. **Power which created Authority can take it away.**—It is obvious also that the same power which created the authority to appoint can, in the absence of constitutional limitations, take it away again. Thus an office of legislative creation can be modified, controlled or abolished by the same power, or the mode of appointments thereto can be changed.<sup>3</sup>

§ 110. **Power may be absolute or conditional.**—The power of appointment may be absolute or conditional. Where it is absolute, the choice of the appointing power, if it falls upon an eligible person, is conclusive. But frequently the power of appointment is conditional, and may be exercised, as in the case of the President of the United States, "by and with the consent of the senate" or some other body only, and this requirement of assent or confirmation is found in all grades of municipal offices.

§ 111. **At what time the Power may be exercised.**—Where power is given to appoint an officer "at" the expiration of the term of his predecessor, an appointment made on the day on which the term expires is not invalid.<sup>4</sup>

<sup>1</sup> *Evansville v. State*, 118 Ind. 426, 21 N. E. Rep. 267.

<sup>2</sup> *Fox v. McDonald*, 101 Ala. 51; *State v. George*, 22 Ore. 142; *State v. Boucher*, 8 N. Dak. 889; *State v. Noble*, 118 Ind. 859, 21 N. E. Rep. 21, citing *Mayor v. State*, 15 Md. 876, 74 Am.

Dec. 572; *State v. Swift*, 11 Nev. 128; *State v. Irwin*, 5 Nev. 111; *Commonwealth v. Hanley*, 9 Penn. St. 513; *Collins v. State*, 8 Ind. 844.

<sup>3</sup> *Davis v. State*, 7 Md. 151, 61 Am. Dec. 831; *State v. Bell*, 116 Ind. 1.

<sup>4</sup> *People v. Blanding*, 68 Cal. 838.

§ 112. **Can not appoint himself to an Office.**—It is contrary to the public policy to permit an officer, having the power to appoint to an office, to exercise that power in his own interest by appointing himself.<sup>1</sup>

§ 113. **Power once exercised is exhausted till Vacancy occurs.**—Where power has been given to appoint to an office and the same has been exercised, any subsequent appointment to the same office will be void unless the prior incumbent has been removed or the office has otherwise become vacant.<sup>2</sup>

§ 114. **What constitutes Appointment.**—Where the power of appointment is absolute, and the appointee has been determined upon, no further consent or approval is necessary, and the formal evidence of the appointment, the commission, may issue at once. Where, however, the assent or confirmation of some other officer or body is required, the commission can issue or the appointment be complete only when such assent or confirmation is obtained.<sup>3</sup>

In either case the appointment becomes complete when the last act required of the appointing power is performed.<sup>4</sup>

<sup>1</sup> *People v. Thomas*, 33 Barb. 287. As where a board appointed one of its own number, and the vote of the appointee was necessary to the appointment. *State v. Hoyt*, 2 Oreg. 246.

<sup>2</sup> *Thomas v. Burrus*, 23 Miss. 550, 57 Am. Dec. 154; See *People v. Woodruff*, 32 N. Y. 355.

<sup>3</sup> *People v. Bissell*, 49 Cal. 407.

<sup>4</sup> *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65. In this case, CARPENTER, J., said: "An appointment is complete when the last act required of the appointing power has been performed. The signing of a commission by the president of the United States, when the appointment was made by him, and the law required a commission, was held to be the last act. *Marbury v. Madison*, 1 Cranch (U. S.) 137. Also a writing signed by the mayor of a city making a nomination to be confirmed by the com-

mon council under the erroneous belief that such confirmation was necessary, although it was not required by law. *People v. Fitzsimmons*, 68 N. Y. 514. In the case of a judicial appointment, a declaration in open court, when the law does not require the appointment to be in writing, has been held to be final. *Hoke v. Field*, 10 Bush (Ky.) 144, 19 Am. Rep. 58. In *Achley's case*, 4 Abb. Pr. (N. Y.) 35, it was held that the appointment was made when both branches of the common council concurred in the passage of a resolution making the appointment. So also in *People v. Stowell*, 9 Abb. N. C. (N. Y.) 456. In *Conger v. Gilmer*, 33 Cal. 75, the law required that justices of the peace appointed by the board of supervisors should receive a commission signed by the officers of the board and sealed with its seal; it was

In cases where a commission is required, the appointment is complete when the commission is signed by the executive, and sealed if necessary, and is ready to be delivered or transmitted to the appointee.<sup>1</sup> After this event, the death of the executive does

held that a commission so signed and sealed was the only evidence of an appointment. If, however, such formal act is to be performed by some other than the appointing power, it constitutes no part of the appointment. *Marbury v. Madison*, *supra*; *People v. Stowell*, *supra*. Such formal acts in such cases are mere ministerial acts."

In this case (*State v. Barbour*, *supra*) a city charter provided that the common council in joint convention should appoint a prosecuting attorney, but gave no directions as to the mode of appointment, and the convention had no power of removal. The convention met for the purpose of making the appointment, and voted "to proceed to ballot for a prosecuting attorney." A ballot was taken, and the relator, Coogan, had a clear majority of all the votes cast, and of the whole convention, and the result was announced by the presiding officer. A resolution declaring relator elected was then proposed and lost. Two resolutions were then offered and passed, one of which declared the ballot taken to be void by reason of errors in it, (which it was found did not exist) and the other declaring the defendant, Barbour "elected and appointed prosecuting attorney." The court held that relator Coogan was duly elected and entitled to the office.

<sup>1</sup> *Justices v. Clark*, 1 T. B. Mon (Ky.) 83, *United States v. LeBaron*, 19 How. (U. S.) 73; *Marbury v.*

*Madison*, 1 Cranch (U. S.) 187; *People v. Murray*, 70 N. Y. 531.

In *United States v. LeBaron*, *supra*, CURTIS, J., says: "When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete."

The transmission of the commission to the officer is not essential to his investiture of the office. If, by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if it were in his custody. It is but evidence of those acts of appointment and qualification which constitute his title and which may be proved by other evidence, where the rule of law requiring the best evidence does not prevent."

not revoke the appointment, although the appointee must give a bond and take an oath before he possesses the office.<sup>1</sup>

But "on general principles," as is said by *WOODBURY, J.*,<sup>2</sup> "the *choice* of a person to fill an office constitutes the essence of his appointment."<sup>3</sup> After the choice, if there be a commission, an oath of office, or any ceremony of inauguration, these are forms only which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable."

§ 115. *Necessity of written Appointment.*—Whether an appointment to a public office can be made by parol without writing is a question not well settled by the authorities. In a leading case<sup>4</sup> in New York involving the title of certain city officers under a statute by which the authority to appoint them was in the mayor alone, and the assent or approval of the common council was not required,<sup>5</sup> it appeared that the officers in question were verbally nominated by the mayor to the common council and that that body had passed a resolution confirming the appointment. But this action by the council, and the record of it, not being required, were held by the court to be *ultra vires* and without efficiency. "They add nothing to the verbal decla-

<sup>1</sup> Continuing, Judge CURTIS says: (*United States v. LeBaron, supra*), "It follows from these premises, that when the commission of a postmaster has been signed and sealed, and placed in the hands of the Postmaster General to be transmitted to the officer, so far as the execution is concerned, it is a completed act. The officer has then been commissioned by the President pursuant to the constitution; and the subsequent death of the President, by whom nothing remained to be done, can have no effect on that completed act. It is of no importance that the person commissioned must give a bond and take an oath before he possesses the office under the commission; nor that it is the duty of the Postmaster General to transmit the commission

to the officer when he shall have done so. These are acts of third persons. The President has previously acted to the full extent which he is required or enabled by the constitution and laws to act in appointing and commissioning the officer; and to the benefit of that complete action the officer is entitled, when he fulfills the conditions on his part, imposed by law."

<sup>2</sup> In *Johnston v. Wilson*, 2 N. H. 205, 9 Am. Dec. 50.

<sup>3</sup> Citing *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Craig v. Norfolk*, 1 Mod. 123.

<sup>4</sup> *People v. Murray*, 70 N. Y. 531.

<sup>5</sup> Laws of 1870, Ch. 175, § 2. *People v. Gates*, 56 N. Y. 337; *People v. Fitzsimmons*, 68 N. Y. 514.

ration and statement of the mayor," said the court by ALLEN, J., "and the claim is that such nomination was a verbal appointment of the persons named to the office, the completed act of the mayor making the appointment; that an appointment by parol without writing is a valid exercise of the power to appoint, and this proposition must be sustained or the respondents cannot hold their judgment. In the *People v. Fitzsimmons*<sup>1</sup> we held, with considerable hesitation and not without great doubts, that a nomination of the mayor of Albany to the common council of that city, and for their action, of individuals for office under the same statute, *in writing*, signed by the mayor officially and filed with the clerk of the common council, in the absence of any statute prescribing the form of the appointment or of the commission to be issued, followed by the taking of the oath of office by the persons named before the mayor, was a sufficient appointment by the mayor under the statute. No stress was laid upon the action of the common council. The paper writing signed by the mayor officially, although addressed to the common council and in the form of a nomination of the persons to that body, was an official appointment to the office by the mayor, and a substantial compliance with the statutes. Judge EARL says: 'No further commission was necessary. That document containing or evidencing the appointment would answer the purpose of a commission, if one was necessary.' He says also: 'It cannot be denied that much can be said in opposition to the conclusion we have thus reached.' There is certainly great force in the dissent of Judge RAPALLO. It is nowhere intimated in the opinion that anything less than a formal paper writing, signed by the official with whom the power of appointment rests, showing clearly his intent to appoint the persons named, and his belief that such writing is that required by the statute, and his intention to make that the final act on his part in perfecting the appointment, will constitute an appointment conferring the office upon the appointees, and such was the paper signed by the mayor in that case, as interpreted and construed by this court. *There is no color in the opinion, or in any statute of this state, or any custom or usage of which we have knowledge, for claiming that an appointment to any civil office*

<sup>1</sup> 68 N. Y. 514.

*can be made verbally or without a proper writing evidencing the fact.<sup>1</sup>*

It would be unfortunate if the title to office of one upon whose official acts public interests and private rights hinged, did or could be made to depend upon the verbal declarations and statements of the person having the power to make the appointment, to be proved by parol and liable to be forgotten, misunderstood or misreported, subject to all the contingencies and infirmities which are incident to verbal evidence, or evidence by parol, so pregnant of mischief and misfortune as to have led to the enactment of the statute of frauds. It will not be presumed that the Legislature, while making void contracts involving trifling pecuniary interests, unless evidenced by some writing, intended that important civil offices should be conferred without a commission or any writing, but simply by a verbal statement of an individual in any form which by the bystanders should be understood as expressing a present intent to make the appointment; and a liberal interpretation will be given to the statutes bearing upon the subject if necessary to avoid any such conclusion. \* \* \* \*

The constitution and the laws of the state create or provide for the creation of all offices, and prescribe the mode of election or appointment, the terms and duration of office, as well as regulate the duties and emoluments. Offices, in certain cases, may be for a term of years, during the pleasure of the appointing power, or during good behavior; but whatever may be the term or tenure of office, the appointment must be in conformity with the statutes of the state. An appointment, in the general sense of the term, may be by deed, or in writing without seal, or verbal, depending upon the subject-matter of the appointment and the terms of the authority under which it is made. *But an appointment to office by the person or persons having authority therefor, as distinguished from an election, can only be made verbally, and without writing, when permitted by the terms of the statute conferring the power.<sup>1</sup>* Affecting the public, and not merely private rights, and being done under the authority of the sovereign power and not under individual authority, it should

<sup>1</sup> The italics are the author's.

be authenticated in a way that the public may know when and in what manner the duty has been performed.”<sup>1</sup>

<sup>1</sup>Proceeding, the learned Judge further says: “A right to an office by election may be perfect when the votes have been cast and canvassed, and the result certified according to law, but then a commission, or the duly authenticated certificate of the result, as the substitute for a commission is the highest and best evidence of the title. An appointment by the Executive by and with the advice and consent of the Senate, is only evidenced by the commission; as the Executive may decline to make the appointment and to issue the commission notwithstanding the advice and consent of the Senate. 2 Story on Const. § 1546.

It is quite evident that no verbal declaration of the Executive would perfect the appointment. The nomination is but the naming of the person as suitable to be appointed; the action of the Senate is merely the advice and consent of that body that the appointment be made; and the appointment is then made and is evidenced by the commission. The act of signing the commission completes the appointment as well as perpetuates the evidence of it. From that time only is the act irrevocable. 1 R. S. 117, §§ 11-14; *Marbury v. Madison*, 1 Cranch (U. S.) 137. The statute (1 R. S. 118, § 19) clearly contemplates a commission, the form of which is not prescribed, which shall be the conclusive evidence of an appointment to a civil office. The article in which the section is found is entitled ‘Of nominations to offices and the commissions of officers,’ and after making provision for officers appointed by the Governor and Senate, and by the Governor, and

all the elective officers, and commissioners of deeds (then appointed by the county judges and boards of supervisors in joint convention) it provides in the last section that ‘the commissions for all other offices, when no special provision is made, shall be signed by the presiding officer of the board or body, or by the person making the appointment.’ The language includes every civil office within the State, not excepted from its operation by statute, and was clearly intended to prescribe the mode of appointment. The appointment under this delegated authority is inchoate until the last act to be done by the appointing power is completed, and that is the signing of the writing or the commission. The appointment is then, and not before, ‘evidenced by an open unequivocal act.’ Ch. J. MARSHALL in *Marbury v. Madison*, 1 Cranch 137, says: ‘Some point of time must be taken when the power of the Executive over an officer not removable at his will must cease; that point of time must be when the constitutional power of appointment has been exercised; when the last act required from the person possessing the power has been performed. The last act is the signature of the commission.’ It is not discretionary with a person having the power to appoint to office, whether there shall be a commission; the signing of the commission is an integral part of the duty of the delegated power, and necessary to a perfect and complete execution of the power entitling the appointee to assume the duties of the office. *People v. Van Slyck*, 4 Cow. (N. Y.) 297, does not bear upon the question in



§ 116. **Same Subject — The contrary View.**—But where a statute authorized “the county judge of the Jefferson county

hand. It related to the designation of one of several town inspectors of election to act as a messenger to deliver the canvass to the board of county canvassers, and it was held that the authority should have been respected on several grounds, none of which by the remotest analogy sanctions the validity of a verbal appointment to office, or gives color to the idea that the mayor of Lockport, meeting three reputable freeholders of the city, might say to them: ‘I appoint you three gentlemen commissioners of excise for this city. Go take the oath of office and enter upon its duties,’ and that this would be a good appointment in virtue of which the incumbents could be ousted. *Saunders v. Owen* (2 Salk. 467, 12 Mod. 199, reported in the Common Pleas as *Owen v. Saunders*, 1 Ld. Raym. 158) is relied upon to sustain the title of the relators to the office in dispute. The facts of the case are more nearly like those in *People v. Fitzsimmons* (68 N. Y. 514) than to the case before us. The Earl of Winchelsea, as *custos rotulorum*, having the power to appoint a clerk of the peace for the county of Kent, had, by writing under his hand and seal, appointed the plaintiff to be clerk of the peace, *durante bene placito*, which the justices of the peace at the sessions refused to recognize, the validity thereof being disputed, whereupon, at the next general session of the peace, the Earl came into court and the writing was read in court, and the Earl without reference to the writing said: ‘I do nominate and appoint the said P. Owen to be the clerk of the peace according to the act of Parliament,’

and Owen was admitted; but upon the death of the Earl of Winchelsea, the Earl of Runney, as the then *custos rotulorum*, appointed Saunders to the office of clerk of the peace, and it was held that the appointment of Owen was valid as an appointment, not during the pleasure of the Earl of Winchelsea, but *quandiu bene gesserit*, as required by the act of Parliament (1 W. & M.) regulating the term of office. The King’s Bench reversed the judgment of the Common Pleas, but was, in turn, reversed by the House of Lords, and the judgment of the Common Pleas, as reported by Lord Raymond, affirmed. The reasons assigned for judgment are entirely inapplicable to any question that can arise under our system of government. Notice is taken of the use of the two words found in the statute, ‘nominate’ and ‘appoint,’ and an argument is based upon the act of nomination, which could be by parol. It is also said, that before the act of 37 H. 8, ch. 1, the clerk of the peace was constituted by parol only, and without deed, as was implied by the preamble using the words ‘nominate and appoint.’ The origin of the office was said to be very clear, but it was thought probable that, at the first, the conservation of the rolls was committed to one of the justices, who was thereupon called *custos rotulorum*, and that by consent of his brethren he nominated the clerk of the peace. The statute of W. & M., using the same words, ‘nominate and appoint,’ which were used in 37 Hen. 8, from which it was implied that before that time the nomination had been by parol, was expounded according

court" to appoint a collector of taxes, it was held by the supreme court of Kentucky that the appointment might be by parol and need not be evidenced by any record or other writing. Said the court: "The power to appoint the collector of back taxes is vested in the judge of the county court. He is to exercise it in his character as judge, and whether the appointment be made in or out of court it is the act of the judge and not of the court. In order, therefore, to make a valid appointment it is not necessary that any memorandum thereof shall be entered upon the order book of the court.

The right of the appointee to be inducted into office depends upon the fact of the appointment, and not upon his ability to establish that fact by the production of an order of court.

to the exposition of the common law; so that, since the new law, a nomination by parol was held good, notwithstanding the office was by it made a freehold. The decision was upon the construction of the statute of Hen. 8, and W. & M., and they were interpreted by references to what was supposed to have been the prior usage. This case certainly throws no light upon the common law, nor aids us in determining what would be a good appointment to office either at common law or under our statutes. It is clearly implied from *Hunt v. Ellsden*, 2 Dyer 152 b, that an appointment to office by parol, or in any way except by deed, is not valid unless made so by statute or usage. In *Curles' case*, 11 Coke, 2 b. it was resolved that the nomination by the King, of auditors of the Court of Wards, ought to be under the great seal of England, and not by word, nor by the privy seal, etc.

In *Craig v. Norfolk*, 1 Mod. 122, the plaintiff claimed under a patent, and the question was upon his seizin in fact of the office in controversy. Statute or usage is necessary to authorize an appointment other than by

writing. The common law does not speak upon the subject. The King cannot grant ancient offices in other manner or form than was usual, if the form be not altered by Parliament, as creating by writ, when before it was by patent, *Com. Dig. Officer A*; *Johnston v. Wilson*, 2 N. H. 202 (9 Am. Dec. 50) related to an elective office, and Mr. Justice Woodbury says: 'On general principles, the choice of a person to fill an office constitutes the essence of his appointment. After the choice, if there be a commission, an oath of office or any ceremony of inauguration, these are forms which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable.' But in the case of an appointment by one representing the public, the choice can only be made under our statute by the commission by which it is evidenced. That is the making of the choice; the act which is effectual, as unequivocal and final."

<sup>1</sup> *Hoke v. Field*, 10 Bush (Ky.) 144, 19 Am. Rep. 58.

The act under consideration does not prescribe the manner in which the judge shall make the appointment, nor does it direct that any written evidence of his action shall be furnished to the person appointed. In such a state of case it is only necessary that the person claiming the office shall show that the officer having the power to appoint has exercised that power, and decided in his favor. This decision must be evidenced by some 'open, unequivocal act.' This act, however, need not be the execution of a writing. The appointment, if made in the presence of the tribunal charged with the duty of taking the bond and administering the oath of office to the appointee, may be by an oral announcement by the judge of his determination.\* \* \*

Field claims that he was appointed to the office on the 3d day of March, 1873. The evidence before us shows that the county judge did decide to appoint him, and that he evidenced that decision by open and unequivocal acts and by oral statements publicly made while the county court was in session. It shows that the clerk of that court, with the knowledge and assent, if not in obedience to the directions of the judge, administered to Field the oath of office, and attested a bond executed by him in open court. We need not decide how far the failure of the judge to sign the orders of court entered of record on the 3d of March, 1873, affects the validity of the qualification of Field as an officer. Such failure in no wise affects his right to the office, as that right springs from the appointment and not from any proceeding in court."

§ 117. **Commission is Evidence merely.**—But the commission does not, of itself, constitute the appointment; it is merely evidence of it, and the fact of the appointment may, in collateral inquiries, be shown by other means.\*

Where one is found acting as a public officer, it is the presumption that he has been duly appointed to the office which he

\* Citing *Marbury v. Madison*, 1 Cranch (U. S.) 157.

\* *Saunders v. Owen*, 12 Mod. 200, 2 Salk. 467.

\* *Commonwealth v. Tobin*, 108 Mass. 426, 11 Am. Rep. 875; *Commonwealth v. Kane*, 108 Mass. 428, 11 Am.

Rep. 878; *Jeter v. State*, 1 McCord (S. Car.) 238; *State v. Lyllies*, 1 McCord, (S. C.) 238; *Hill v. State*, 1 Ala. 559; *Allen v. State*, 21 Ga. 217, 68 Am. Dec. 457; *State v. Capers*, 37 La. Ann. 747.

assumes to exercise, and all of his acts done by what appears to be public authority are presumed to be rightly done until the contrary is proved.<sup>1</sup>

But where the claimant's title to the office is directly assailed, the commission from the executive would certainly be the best evidence of his right.<sup>2</sup>

§ 118. **When Commission issues.**—Where a statute provides for an office, fixing no date for its beginning, but requiring a commission to be issued, it is presumed that the commission will issue within a reasonable time and the term of office will date from then.<sup>3</sup>

§ 119. **Commission may be revoked if improperly issued.**—Where the executive through mistake erroneously issues the commission to the wrong person, he may revoke it and reissue it to the person lawfully entitled to receive it.<sup>4</sup>

§ 120. **Appointment in other Cases is irrevocable.**—In other cases, however, where the appointing power has not also the absolute power of removal, the exercise of the appointing power is irrevocable, and the appointee will hold during the term, unless otherwise duly removed.<sup>5</sup>

§ 121. **Under what Circumstances appointing Power exercised.**—The power of appointment may be conferred to be exercised in two classes of cases:

1. To fill offices filled only by appointment, or *original appointments*.
2. To fill offices originally filled by election, but made vacant by some cause, or *appointments to fill vacancies*, both of which deserve attention.

<sup>1</sup> Commonwealth v. Kane, 108 Mass. 423, 11 Am. Rep. 373; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64; Carter v. Sympton, 8 B. Mon. (Ky.) 155; Callison v. Hedrick, 15 Gratt. (Va.) 244.

<sup>2</sup> State v. Allen, 21 Ind. 516, 83 Am. Dec. 367; Beal v. Morton, 18 Ind. 346.

<sup>3</sup> Brodie v. Campbell, 17 Cal. 11.

<sup>4</sup> Gulick v. New, 14 Ind. 93, 77 Am. Dec. 49; State v. Capers, 37 La. Ann. 747.

<sup>5</sup> State v. Barbour, 53 Conn. 76, 55 Am. Rep. 65; Marbury v. Madison, 1 Cranch (U. S.) 137; Achley's Case, 4 Abb. Pr. (N. Y.) 35; Cole v. Chapman, 44 Conn. 601; Putnam v. Langly, 133 Mass. 204.

## I.

## ORIGINAL APPOINTMENTS.

§ 122. **More often exercised under National than State Governments.**—The method of filling public offices existing under the government of the United States is generally that of appointment by the executive or heads of departments, the only officers who are elective being the president, the vice-president (and these not directly so) and the members of Congress.

Under the State governments, and for obvious reasons, the rule is otherwise. There the large majority of the public officers, and particularly those who are to come in contact with the people directly, are elected at popular elections, and the power of appointment in the first instance exists in but few cases, being chiefly confined to the filling of vacancies, and then usually only until the next regular election.

So, also, where the power of appointment exists, it is, except in the case of purely State officers, usually conferred only upon the executive branch of the local department, municipality or government having jurisdiction over the territory within which the officer's powers are to be exercised.

§ 123. **Local Offices can not be permanently filled by legislative Appointment.**—Indeed this right of *local self-government*, as it has been briefly termed, is held to be an established feature and incident of our political system, and it is not within the power of the legislature of a State to permanently fill by appointment the local offices established by law for purely local purposes.<sup>1</sup>

<sup>1</sup> *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108; *Attorney-General v. Lothrop*, 24 Mich. 235; *Attorney-General v. Detroit*, 29 Mich. 110; *People v. Detroit*, 28 Mich. 228; *State v. Denny*, 118 Ind. 449, 21 N. E. Rep. 252; *Evansville v. State*, 118 Ind. 426, and cases cited in § 106 *ante*.

In *People v. Hurlbut*, *supra*, a case involving the right of the legislature to make permanent appoint-

ments of members of a local board of public works, COOLEY, J., says:

"The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and

Such appointments, however, may, it seems, be made, provisionally only, for the purpose of primary organizations and to serve

would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether. If we look into the several State constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy. The implied restrictions upon the power of the Legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook

to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

The circumstances from which these implications arise are: *First*, that the constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and *second*, that the liberties of the people have generally been supposed to spring from, and be dependent upon that system.

De Tocqueville speaks of our system of local government as *the American system*, and contrasts it forcibly with the French idea of centralization, under the influence of which constitutional freedom has hitherto proved impossible; *Democracy in America*, chapter 5. Lieber makes the same comparison, and shows that a centralized government, though by representatives freely chosen, must be despotic, as any other form of centralization necessarily is. 'Self-government,' he says, 'means everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is; but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality;' *Civil Liberty and Self-Government*, chapter 21. The writer first named, speaking of the New England township government, whose system we have followed in the main, says: 'In this part of the Union the impulsion of

until others can be chosen by the local authorities in the regular way.<sup>1</sup>

political activity was given in the townships; and it may almost be said that each of them originally formed an independent nation. When the kings of England asserted their supremacy, they were contented to assume the central power of the State. The townships of New England remained as they were before; and, although they are now subject to the State, they were at first scarcely dependent upon it. It is important to remember that they have not been invested with privileges, but that they seem on the contrary, to have surrendered a portion of their independence to the State. The townships are only subordinate to the States in those interests which I shall term *social*, as they are common to all the citizens. They are independent in all that concerns themselves; and among the inhabitants of New England, I believe that not a man is to be found who would acknowledge that the State has any right to interfere in their local interests; *'Democracy in America, ubi supra*. Now, if this author is here speaking of the theory of our institutions, he is in error. It is not the accepted theory that the States have received delegations of power from independent towns; but the theory is, on the other hand, that the state governments precede the local, create the latter at discretion, and endow them with corporate life. But, historically, it is as difficult to prove this theory as it would be to demonstrate that the origin of government is in compact, or that title to property comes from occupancy. The historical fact is, that

local governments universally, in this country, were either simultaneous with, or preceded, the more central authority. In Massachusetts, originally a democracy, the two may be said to have been at first identical; but when the colony became a representative government, and new bands pushed out into the wilderness, they went bearing with them grants of land and authority for the conduct of their local affairs. Hutchinson's *Massachusetts Bay*, ch. 1; Washburn's *Jud. Hist. of Mass.* ch. 1; *Body of Liberties*, §§ 62, 66, 72; Elliot's *New England*, Vol. 4, pp. 425, 427.

But in Connecticut the several settlements originated their own governments, and though these were doubtless very imperfect and informal, they were sufficient for the time being, and the central government was later in point of time; Trumbull's *Hist. of Conn.* Vol. I., pp. 132, 498; Palfrey's *New England*, Vol. I., p. 454. What the colony did was only to confer charters, under which the town authority would be administered within agreed limits, and possibly with more regularity than before. In Rhode Island, it is also true, that township organization was first in order of time. Arnold's *Hist. of R. I.* ch. 7. This author justly remarks, that when the charter of Rhode Island was suspended to bring her under the dominion of Andros, *'the American system of town governments*, which necessity had compelled Rhode Island to initiate fifty years before, became the means of preserving the liberty of the individual citi-

<sup>1</sup> *State v. Swift*, 11 Nev. 128; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

§ 124. **Discretion of appointing Power.**—Where the authority to make appointments is absolute, the appointing power is sub-

zen when that of the State, or colony, was crushed: Vol. I., p. 487. So in Vermont, the people not only for a time conducted all their public affairs in towns and plantations, through committees, officers and leaders, nominally appointed and submitted to by general consent and approbation, but they carried on their controversy with New York for some years, without any other organization: Williams' Hist. of Vermont, Vol. II., p. 163. In New Jersey, as in Massachusetts, towns were chartered in connection with grants of land, and, in some instances, those which were made by Nichols, adverse to the proprietary, were suffered to remain after his authority was superseded: See instances in Mulford's Hist. of N. J. pp. 143-4. The charter to Lord Baltimore plainly recognized local government in the provision requiring the laws and ordinances established to conform to the laws, statutes or rights of England: Bozman's Hist. of Maryland, p. 270. And county authorities seem to have existed from the very first, though their statutory organization, if any they had, can not be traced: Bozman, pp. 299-303. But it can not be necessary to particularize further. The general fact was, that whether the colonial or local authority should originate first, depended entirely upon circumstances which might make the one or the other the more immediate need. But when both were once established they ran parallel to each other, as they were meant to do, for all time; and what Mr. Arnold says of Rhode Island may be said generally of the eastern and middle States, that the attempt of the last two Stuarts to

overthrow their liberties was defeated by means of the local organizations. The scheme tried first in England, to take away the corporate charters in order to make the corporators more dependent on the crown, and to restrain them from political action in opposition to the court party, found, in America, the colonial charters alone within the reach of arbitrary power; and though these were taken away or suspended, it was only with such protest and resistance as saved to the people the town governments. In Massachusetts, it was even insisted by the people's deputies that, to surrender local government was contrary to the sixth commandment, for, said they, 'men may not destroy their political any more than their natural lives.' So it is recorded they clung to 'the civil liberties of New England' as 'part of the inheritance of their fathers.' Palfrey's New England, Vol. 3, pp. 881-883; Bancroft's U. S., Vol. 2, pp. 125-127; Mass. Hist. Col. XXI. 74-81. The whole contest with Andros, as well in New England, as in New York and New Jersey, was a struggle of the people in defense of the right of local government. 'Everywhere,' says Dunlap, 'the people struggled for their rights and desired to be free.' Hist. of N. Y. Vol. I. p. 133; and see Trumbull's Hist. of Conn. Vol. I. ch. 15.

I have confined this examination to the States which have influenced our own polity most; but the same principle was recognized and acted on elsewhere. The local governments, however, were less complete in the States further south, and this, with some of their leading statesmen, was a source of regret. Mr. Jefferson,



ject to no other condition or qualification than that it shall be exercised at the time, in the manner and to the extent prescribed by law, and that the appointee shall be eligible.<sup>1</sup> Where, however, it can be exercised only by and with the consent and approval of the senate or other similar body, its exercise has no effect unless such consent or approval be given.

writing to Governor Tyler in 1810, speaks of the two great measures which he has at heart, one of which is the division of counties into hundreds. 'These little republics,' he says, 'would be the main strength of the great one. We owe to them the vigor given to our revolution, in its commencement, in the eastern States. Could I once see this, I should consider it as the dawn of the salvation of the republic.' *Jefferson's Works*, Vol. 5, p. 525. Mr. Jefferson understood thoroughly the truth, so quaintly expressed by Bacon, when he said of a burden imposed as compared to one freely assumed, that 'it may be all one to the purse, but it worketh diversely upon the courage.'

Such are the historical facts regarding local government in America. Our traditions, practice and expectations have all been in one direction. And when we go beyond the general view to inquire into the details of authority, we find that it has included the power to choose in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a state power, have been purely exceptional. The most prominent of these was the case of the mayor of New York, who continued, for a long time after the revolution, the appointee of the governor. But this mode of choice originated when the city was the seat of colonial government, and while it

constituted a large part of the colony, and the office was afterwards of such dignity and importance, and was vested with so many general powers, that one of the first statesmen of the nation did not hesitate to resign a seat in the senate of the United States to accept it; Hammond's *Pol. Hist. of N. Y.* Vol. 1, p. 197. Moreover, the first constitution of New York was, in important particulars, exceptional. That State had at the time a powerful aristocratic element, by which its first institutions were in a great measure shaped; and a distrust of popular authority was manifest. It is scarcely needful to say that features of that character disappeared when the constitution was revised.

For those classes of officers whose duties are general—such as the judges, the officers of militia, the superintendents of police, of quarantine, and of ports, by whatever name called—provision has to a greater or less extent been made by state appointment. But these are more properly State than local officers; they perform duties for the State in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general."

<sup>1</sup>Appointments in excess of the number authorized by law are void. *Weeks v. United States*, 21 Oct. Ct. 124.

## II.

### APPOINTMENTS TO FILL VACANCIES.

§ 125. Power may exist in two Classes of Cases.—The power of appointment to fill vacancies may exist in two classes of cases,—

1. Vacancies in offices originally filled by appointment, and
2. Vacancies in offices originally filled by election.

§ 126. What constitutes a Vacancy?—A vacancy exists when there is no person lawfully authorized to assume and exercise at present the duties of the office.<sup>1</sup>

“The word ‘vacancy’ as applied to an office,” it is said in a recent case,<sup>2</sup> “has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event.”<sup>3</sup>

§ 127. Classification of Vacancies.—Vacancies have been said to be either original, constructive, accidental or absolute. A vacancy is original when an office is created, and no one has been appointed to fill it. It is constructive when the incumbent has no legal right or claim to continue in office, but can be legally replaced by another functionary. It is accidental when, the incumbent having died, resigned or been removed, there is no one *in esse* discharging the duties of the office. It is absolute when, the term of an incumbent having expired and the latter not having held over, no successor is in being who is now legally qualified to assume the office.<sup>4</sup>

<sup>1</sup> See *Stocking v. State*, 7 Ind. 326.

<sup>2</sup> *State v. Harrison*, 118 Ind. 284, 8 Am. St. Rep. 668.

<sup>3</sup> Citing *Stocking v. State*, 7 Ind. 326; *Collins v. State*, 8 Id. 844; *Akers v. State*, 8 Id. 484; *State v. Bemenderfer*, 96 Id. 374; *Gosman v.*

*State*, 106 Id. 203; *Butler v. State*, 20 Id. 169; *People v. Tilton*, 87 Cal. 614; *State v. Lusk*, 18 Mo. 388; *Commonwealth v. Hanley*, 9 Penn. St. 518.

<sup>4</sup> See *State v. Rarehide*, 83 La. Ann. 984.

§ 128. **Whether Office filled by prior Incumbent holding over is vacant.**—The constitution of California provided: "When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy by granting a commission which shall expire at the end of the next session of the legislature or at the next election of the people."<sup>1</sup> Under this section it was held that where an act creating an office and fixing the duration of the term provides that the officer shall be elected by the legislature and shall hold his office until his successor is elected and qualified, the failure of the legislature to elect at the expiration of the term does not create such a vacancy as the governor is authorized to fill by appointment, but the incumbent holds until his successor is elected by the legislature. If there was a vacancy, in any proper sense, after the expiration of the term and before the election and qualification of a successor, the statute itself filled the vacancy for the time being by providing that the old incumbent shall hold till a successor shall be elected and qualified.<sup>2</sup>

"It was manifestly the intent of the constitution," said the court, "that the governor should appoint only where there is no party authorized by law to discharge the duties of the office. The object was to prevent a public inconvenience arising from the want of a party authorized for the time being to discharge the duties of a public office. When there is a party expressly authorized by law to discharge those duties temporarily, till the power upon whom the duty of election or appointment is devolved can regularly act, there is no occasion for calling into exercise this extraordinary power vested in the governor to make a merely *temporary* appointment. There is no good reason for appointing a party to temporarily discharge the duties of an office when there is already a party expressly authorized by the constitution or laws to temporarily discharge those duties. The very reason upon which the power is vested in the governor fails, and the case provided for has not arisen. And it can make no difference

<sup>1</sup> Const. Cal. Sec. 8 Art. V.

<sup>2</sup> People v. Tilton, 87 Cal. 614, citing People v. Mizner, 7 Cal. 519; People v. Langdon, 8 Cal. 1; People

v. Whitman, 10 Cal. 46, and holding People v. Reid, 6 Cal. 239; overruled by People v. Whitman, 10 Cal. 46.

whether the language expressly authorizing a party to hold over and discharge the duties of an office temporarily till a successor duly elected and qualified appears, is found in the constitution or in the statute. The same construction should be given to the same language used in the same connection, in reference to a similar subject-matter, when used in a statute as when used in the constitution."

The same ruling as to a vacancy was also made in a subsequent case where the term of the incumbent of an office, filled by the governor with the confirmation of senate, had expired, but the incumbent still continued to discharge the duties of the office.<sup>1</sup> Like rulings have also been made in other States,<sup>2</sup> and such seems to be the settled principle of the law.

§ 129. **Whether Failure to elect leaves Office vacant.**—Where an incumbent of an office, elected by the people or some other body, or appointed by the executive with the consent of the Senate, is, by law, entitled to hold over until his successor is elected and qualified, the failure or neglect to appoint or elect his successor, presents the same question considered in the previous section, and, in accordance with the rules there laid down, the office would not be deemed vacant, in such manner as to be filled by the appointment by the executive alone, there being a person authorized by law to continue to exercise the duties and functions of the office until a successor, duly elected and qualified, appears to assume it.<sup>3</sup>

<sup>1</sup> *People v. Bissell*, 49 Cal. 408.

<sup>2</sup> *State v. Harrison*, 118 Ind. 234, 8 Am. St. Rep. 663; *State v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321; *State v. Lusk*, 18 Mo. 333; *Commonwealth v. Hanley*, 9 Penn. St. 518. See also the following section.

<sup>3</sup> In *State v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321 it appeared that commissioners of the State reform school were to be appointed by the governor, by and with the advice of the senate, and were to hold their offices for three years and until their successors were appointed and qualified. Howe was duly appointed

on April 16, 1872, and on April 9, 1875, the governor, without the advice or consent of the senate (the general assembly not being then in session), appointed Harper as the successor of Howe for the term of three years from April 16, 1875, and Harper took the oath and gave the bond required. The act providing for the commissioners declared that vacancies in the board "shall be filled as the original appointments are made except when the general assembly is not in session, and then by the governor, until the 20th day of the next session of the general assembly."

Where, however, the incumbent of an office for a definite term has no authority by law to hold over, the failure or neglect to appoint or elect his successor must leave the office vacant.<sup>1</sup>

The court held however that there was no vacancy which the governor could fill by his own appointment, either on the 9th or the 16th of April, 1875, and that Howe was still entitled to the office. *People v. Tilton*, 87 Cal. 614, cited in the previous section, was cited and relied upon. The court further say: "To the same effect is *State v. Lusk*, 18 Mo. 838. The office in controversy in that case was that of 'public printer' created by a statute which fixed the term of office at two years, and until a successor was elected and qualified. The statute also provided that 'if the public printer should die or resign, or if, *from any other cause*, the office should become vacant, the governor shall appoint a public printer who shall give bond and qualify, and shall hold his office for the same time that the printer in whose stead he shall be appointed would have held,' and the constitution of the state provided that 'when any office shall become vacant, the governor shall appoint a person to fill such vacancy,' etc. Lusk was duly elected to the office for a term which expired before the legislature, whose duty it was to elect a successor, had done so. Afterward, there still being no successor elected by the legislature, the governor appointed one Treadway to fill the alleged vacancy. Upon this state of law and fact the court held that the failure of the legislature to elect a successor to Lusk did not create a vacancy which the governor could fill by appointment, but that the incumbent, who was authorized

to hold the office until his successor was appointed and qualified, held over.

In *Commonwealth v. Hanly*, 9 Penn. St. 518 the supreme court of Pennsylvania held that the death of the person elected to fill the office of clerk of the Orphans' Court before he had qualified himself according to law, does not create a vacancy, but the incumbent, who is authorized to hold the office until his successor shall be elected and qualified, holds over. The office here in dispute was one created by the constitution of the State, which provided that the incumbent should hold his office for three years, if he should so long behave himself well, and until his successor should be duly *qualified*. Hanly, having been elected to the office in October, 1845, duly qualified and entered upon his term on the 19th of December, 1845. In October, 1848, one Brooks was duly elected as his successor, but died before qualification. Broom, the re-lator, was appointed by the governor to fill the vacancy, which, it was assumed by his appointment, would occur at the expiration of Hanly's term of three years. The constitution of the State provided that any vacancy occurring in said office should be filled by appointment, to be made by the governor, to continue until the next general election, and until a successor should be elected and qualified. After the expiration of Hanly's term of three years, the Commonwealth, on the relation of Broom, prosecuted a pro-

<sup>1</sup> See *State v. McLure*, 84 N. C. 153.

Where the constitution limits the term of a public officer to a fixed period, it is held not to be within the power of the Legislature to provide that he shall also hold until his successor qualifies.<sup>1</sup>

§ 130. **Whether Failure to qualify causes Vacancy.**—Within the principles of the preceding section, the failure of the newly elected or appointed officer to qualify as required by law would not, where by law his predecessor held over until his successor was elected and qualified, create a vacancy;<sup>2</sup> but where no such provision was found the office would be vacant.<sup>3</sup>

§ 131. **Whether Election of unqualified Person causes Vacancy.**—Where a person elected to an office is not qualified to enter upon and hold the same at the time fixed by law therefor, and

ceeding in *quo warranto* to oust Hanly and to induct Broom. The judgment was for the defendant, upon the grounds above stated."

See also *People v. Fitch*, 1 Cal. 519; *Kimball v. Alcorn*, 45 Miss. 151; *People v. Forquer*, 1 Ill. 68.

The question was considered, but not decided in *People v. Parker*, 37 Cal. 639.

The question is also considered in the late case of *State v. Harrison*, 118 Ind. 234, 3 Am. St. Rep. 663, where it is said: "Whether or not, as a general principle of the common law, officers are entitled to hold over beyond their prescribed terms without some express provision, is not settled upon authority, although the view adopted by the American courts seems to be that, in the absence of any restrictive provision, the officer is entitled to hold until he is superseded by the election of another in his place. *Tuley v. State*, 1 Ind. 500; *People v. Runkle*, 9 Johns. (N. Y.) 147; *Trustees v. Hills*, 6 Cow. (N. Y.) 33, 16 Am. Dec. 429; *McCall v. Bryam Mfg. Co.* 6 Conn. 428; *State v. Fagan*, 42 Conn. 32; *Sparks v.*

*Farmers Bank*, 3 Del. Ch. 274; *Stratton v. Oulton*, 28 Cal. 44; *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302; 1 Dillon on Municipal Corporations, Sec. 219. Whatever the rule of the common law may have been, it is quite certain that where, by the constitution or law, officers are elected for a term, and until their successors are elected and qualified, they are thereby authorized to continue to hold and exercise their offices until they are superseded by the election of other persons in their places. *Tuley v. State*, 1 Ind. 500; *Miller v. Burger*, 2 Id. 337; *Baker v. Kirk*, 33 Id. 517; *State v. Berg*, 50 Id. 496; *Gosman v. State*, 106 Id. 203; *Elam v. State*, 75 Id. 518."

<sup>1</sup> *State v. Brewster*, 44 Ohio St. 589.

<sup>2</sup> *Commonwealth v. Hanly*, 9 Penn. St. 513.

<sup>3</sup> Failure to qualify within a prescribed time is usually declared in express terms to create a vacancy, and in such case the governor may appoint. Opinion of Judges—Fla.—5 S. Rep. 612; *State v. Wilson*, 72 N. C. 155.

no provision is made for the prior incumbent to hold over, the office is vacant and may be filled by appointment;<sup>1</sup> but such a vacancy would not, within the principles of preceding sections, exist where by law the prior incumbent holds over until the election and qualification of his successor.

§ 132. **Whether newly created Office is vacant.**—Whether a newly created office which has never had an incumbent and which no one is now legally authorized and qualified to assume, can be deemed vacant so as to authorize an appointment to fill it, is a question upon which the authorities are not in harmony, but the weight of authority seems to be that it is to be deemed vacant. Thus it is said in Indiana, "There is no technical or peculiar meaning to the word 'vacant' as used in the constitution. It means empty, unoccupied, as applied to an office, without an incumbent. There is no basis for the distinction urged that it applies only to offices vacated by death, resignation or otherwise. An existing office, without an incumbent, is vacant, whether it be a new or an old one. A new house is as vacant as one tenanted for years, which was abandoned yesterday. We must take the words in their plain, usual sense."<sup>2</sup> The same principle has also been asserted in Nevada,<sup>3</sup> but denied in Mississippi.<sup>4</sup>

§ 133. **When Vacancies anticipated may be filled.**—A prospective appointment to fill an anticipated vacancy in a public office, made by the person or body which, *as then constituted*, is empowered to fill the vacancy when it arises, is, in the absence of express law forbidding it, a legal appointment, and vests title to the office in the appointee.<sup>5</sup> Thus where a public officer re-

<sup>1</sup> *People v. Curtis*, 1 Idaho, 758.

<sup>2</sup> *Stocking v. State*, 7 Ind. 326.

<sup>3</sup> *State v. Irwin*, 5 Nev. 111. See also, *People v. Mott*, 8 Cal. 502; *Rhodes v. Hampton*, 101 N.C. 629, 8 S. E. Rep. 219.

<sup>4</sup> *O'Leary v. Adler*, 51 Miss. 28.

<sup>5</sup> "The almost uniform course of practice for years in this State, without question or objection, strongly implies the legality of an appointment thus made; besides, it seems to me that the question is no longer open

to controversy in the courts of this State. In the case of *Haight v. Love*, 10 Vroom (N. J.) 14, 476, by adjudication of this court, as well as by the Court of Errors, on review, an appointment so made was supported. In that case, it is true that the occurring vacancy was anticipated by but a few days, but the principle upon which that appointment was validated is unchanged by the circumstance that as many weeks intervene. The cases cited by the relator

signs his office to take effect at a future day, and his resignation is accepted, the appointing power being, as then organized, authorized to fill the vacancy when it shall occur, may appoint a successor, the appointment to take effect when the resignation becomes operative.<sup>1</sup>

But the appointing power can not forestall the rights and prerogatives of their own successors by appointing successors to offices expiring after their power to appoint has itself expired. "It is plain," says the court, "that an appointment thus made by anticipation has no other basis than expediency and convenience, and can only derive its binding force and effect from the supposition that there will be no change of person and consequently, of will, on the part of the appointing power between the date of the exercise of that power by anticipation and that of the necessity for the exercise of such power by the vacancy of the office."<sup>2</sup>

§ 134. **Appointments "by and with the Advice and Consent of the Senate."**—It is frequently provided by the constitutions of the States, as by that of the United States, that the executive—the governor or president—shall have power to fill certain vacancies by appointments made "by and with the advice and consent of the senate." Where such a provision exists, the executive can only exercise the appointment without such advice and consent where, since the adjournment of the senate, a vacancy exists or has occurred (words held to mean the same thing<sup>3</sup>) by the death or resignation of the incumbent or by the happening of some other event by reason of which the duties of the office are no longer discharged.<sup>4</sup> If the senate be in session when the vacancy occurs, it can be filled only by and with the advice and consent of that body,<sup>5</sup> unless the senate has adjourned before the vacancy is filled.<sup>6</sup>

in support of an opposite view are not applicable to this case. The case of *Biddle v. Willard*, 10 Ind. 68, went off upon the construction of local statutes. The same is true of the case of *People v. Wetherell*, 14 Mich. 48, and *Noce v. Bradley*, 8 Blackf. (Ind.) 158; *Whitney v. Van Buskirk*, 40 N. J. L. 463.

<sup>1</sup> *Whitney v. Van Buskirk*, 40 N.J. L. 463.

<sup>2</sup> *Ivy v. Lusk*, 11 La. Ann. 486. See also, *People v. Reid*, — Colo. —, 17 Pac. Rep. 802.

<sup>3</sup> See *post* §§ 187, 188.

<sup>4</sup> *State v. Rareshide*, 83 La. Ann. 934.

<sup>5</sup> *State v. Rareshide*, 83 La. Ann. 934; *People v. Fitch*, 1 Cal. 519; *Kimball v. Alcorn*, 45 Miss. 151.

<sup>6</sup> See *post* §§ 187, 188.



If the vacancy is accidental and occurs or exists while the senate is not in session, and the concurrence of the senate has not been had, the appointment is temporary and contingent upon confirmation. In the event that it is not confirmed by the senate at its next session, either because the name was not sent in or was rejected, the appointment becomes inoperative from the moment of the adjournment of that session or from the moment of its rejection, as the case may be.<sup>1</sup>

Where the nomination is approved, the officer's title, rights and authority are held to relate back to the time of his appointment, and do not begin only with his confirmation.<sup>2</sup>

The governor may be excused from the necessity of obtaining the approval of the senate to his appointments, where that body has unlawfully usurped the absolute power of making the appointments on its own motion.<sup>3</sup>

§ 135. **Appointments to fill Vacancies occurring in Offices originally filled by Senate.**—It is also frequently provided, in cases of offices filled by appointment by the senate or other body, that vacancies occurring during the vacation of the senate or other body may be filled by the executive. In such cases the power of the executive to fill by appointment exists only in the contingency named, *i. e.*, a vacancy occurring during vacation.

Thus it was provided in Mississippi that a public printer should be elected by a joint convention of both houses of the legislature, and that vacancies in the office should "be filled in the same manner for the unexpired term, and, in vacation of the legislature, by the governor until such session." Under this provision, it was said, "Primarily, the bestowment of the office is with the legislature; in vacation it is with the governor. If the vacancy occur during the session it must be filled by election of that body. If the vacancy is filled by the governor in the recess, it is 'until such session' of the legislature. We think it clear that the governor cannot fill the office, or nominate to the senate, during the session."<sup>4</sup> And the same construction

<sup>1</sup> *State v. Rareshide*, 32 La. Ann. 984; *Kroh v. Smoot*, 62 Md. 172.

<sup>2</sup> *Dyer v. Bayne*, 54 Md. 87; *Shepherd v. Haralson*, 16 La. Ann. 184.

<sup>3</sup> *State v. Tate*, 68 N. C. 546.

<sup>4</sup> *Kimball v. Alcorn*, 45 Miss. 151. Where an office was created and took effect during a session of the Senate, and a subsequent session of Congress passed without the office being filled,

was applied in a similar case in California, where the court held that the power of appointment was limited to the filling, during vacation, of a vacancy occurring in vacation. If the vacancy occurs during the session, or, though occurring in vacation, is left unfilled until the session, the power then reverts to the legislature.<sup>1</sup>

§ 136. **Appointments to fill Vacancies occurring during Session, but left unfilled.**—So though a vacancy occur during the session and is left unfilled by the legislature on its adjournment, it can not, it has been held, be filled by the governor, under such a statute, in vacation.<sup>2</sup> But—

§ 137. **Same Subject.—Rule in United States Courts.**—A different construction prevails in the courts of the United States. Section 1769 of the Revised Statutes provides that “The president is authorized to fill all vacancies which may happen during the recess of the senate, by reason of death or resignation or expiration of term of office, granting commissions which shall

it was held that the President could not make a valid appointment to such office in the recess of the Senate. *Schenk v. Peay*, 1 Dill. 287.

<sup>1</sup> *People v. Fitch*, 1 Cal. 519. See 4 Opin. Atty. Genl. 361; 12 *Id.* 457.

<sup>2</sup> *People v. Forquer*, 1 Ill. 68. This question was raised but not decided in *Kimball v. Alcorn*, 45 Miss. 151, 160, where the court say: “Perhaps, too, a liberal interpretation of the statute of 1857, looking rather to its spirit and purpose than its letter, would have authorized the governor to fill in vacation a vacancy which happened during the session, if the legislature failed to elect, on the idea that the vacancy happened every day the office was unfilled. The duties of public printer do not terminate with the session of the Legislature. Many of them (of the most important, too,) must necessarily be performed in vacation. The law contemplates that there shall al-

ways be an incumbent. That construction would be narrow and not commensurate with the demands and necessities of the public interests (and should be avoided unless compelled by the terms of the statute) which at any time or under any circumstances would not find competent authority to fill a vacancy.

A vacancy might occur by death or other casualty so shortly before the adjournment of the legislature that the body might adjourn without notice of it. If the governor could not appoint, great public inconvenience would ensue; yet such a vacancy was as complete during the session as if it had happened the first day or the first week. But upon this point it is not necessary that we should express an opinion, and we do not therefore commit ourselves upon it.”

See, however, the two sections following.

expire at the end of their next session." In a case involving the construction of this section, it appeared that one Henry P. Farrow had held the office of district attorney by appointment of the president by and with the advice and consent of the senate, and that his term expired April 19, 1880, during a session of the senate. On April 23, Mr. Justice BRADLEY re-appointed him by virtue of section 793 of the Revised Statutes which provides that "in case of a vacancy in the office of district attorney \* \* the circuit justice \* \* may fill the same and the person appointed by him shall serve until an appointment is made by the president and the appointee is duly qualified and no longer." In May the president nominated one John S. Bigby to the office but the senate adjourned on the 16th of June without acting on the nomination. The president, however, issued a commission to Bigby on July 6, and the latter duly qualified.

In an action<sup>1</sup> to determine the title to the office, it was said by Woods, J.: "The contention is that the vacancy in the office of district attorney, which the president has undertaken to fill by the appointment of Bigby, did not happen during the recess of the senate, and therefore the power to fill it does not reside in the president.

On the other hand it is claimed that the phrase 'vacancies that may happen during the recess of the senate,' when properly construed, means 'vacancies which may happen to exist during the recess of the senate.' In support of this latter view, the practice of the executive department of the government for nearly sixty years is invoked, and the concurring opinions of ten of the distinguished jurists who have filled the office of attorney-general of the United States are cited.

The first opinion given upon this point is that of Mr. William WIRT, attorney-general under President Monroe,\* in which he argues for the construction claimed in support of the president's action in this case. He says: 'In reason, it seems to me perfectly immaterial when the vacancy first arose, for, whether it arose during the session of the senate or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of

<sup>1</sup> *In re*, Farrow (1880), 8 Fed Rep. 112, 24 Myer's Fed. Dec. § 247.

\* 1 Op. 681.

things at the point of time at which the president is called upon to act. Is the senate in session? Then he must make a nomination to that body. Is it in recess? Then the president must fill the vacancy by a temporary commission. This seems to me the only construction of the constitution which is compatible with its spirit, reason and purpose, while at the same time it offers no violence to its language, and these are, I think, the governing points to which all sound construction looks.'

This opinion of Attorney-General WIRT was concurred in by Mr. Roger B. TANNEY, attorney-general under President Jackson.<sup>1</sup> Mr. TANNEY says in construing that clause of the constitution under consideration: 'It was intended to provide for those vacancies which might arise from accident, and the contingencies to which human affairs must always be liable; and if it falls out that from death, inadvertence or mistake, an office required by law to be filled is, in recess, found to be vacant, then a vacancy has happened during the recess and the president may fill it. This appears to be the common sense and the natural import of the words used. They mean the same thing as if the constitution had said 'if there happen to be any vacancies during the recess.' It is not necessary to quote from the opinions, upon this question, of the other distinguished jurists who have filled the office of attorney-general. I simply refer to them.' These opinions exhaust all that can be said on the subject." The title of Bigby was therefore confirmed.

§ 188. *Same Subject.*—*Rule in New Jersey.*—The rule prevailing in the United States courts has also been adopted in a recent case, elaborately considered, in the supreme court of New Jersey.<sup>2</sup>

§ 139. *Same Subject.*—*Appointee holds only until Close of next Session.*—It is usually provided by the constitution or

<sup>1</sup> See his opinion dated July 19, 1832 (3 Op. 535).

<sup>2</sup> They are the opinions of Mr. Hugh S. Legare, dated October 22, 1841 (3 Op. 678); of Mr. John Y. Mason, dated August 10, 1846 (4 Op. 538); of Mr. Caleb Cushing, dated May 25, 1855 (7 Op. 186); of Mr. Edward Bates, dated October 15, 1862 (10 Op.

356); of Mr. James Speed, dated March 25, 1865 (11 Op. 179); of Mr. Henry Stanberry, dated August 30, 1866 (12 Op. 32); and of Mr. William M. Evarts, dated August 17, 1868 (12 Op. 449).

<sup>3</sup> *State v. Kuhl.* — N. J. —, 17 Atl. Rep. 102.

statutes that an officer thus appointed by the executive alone shall hold the office until the close of the next regular session of the legislature, unless a successor shall have been sooner appointed. His title, therefore, expires with the next session, even though no successor has been appointed.<sup>1</sup>

Appointments thus made are often required to be submitted to the senate for its approval. In this case, if the senate rejects the nomination, the officer's title, it is said, at once ceases,<sup>2</sup> but even though approved, the officer, unless re-nominated and confirmed during the session, holds only till the end of the session or the earlier appointment of his successor,<sup>3</sup> the approval of the appointment during vacation not being equivalent to an appointment for the remainder of the unexpired term.<sup>4</sup>

<sup>1</sup> *Kroh v. Smoot*, 63 Md. 172; *State v. Rareshide*, 83 La. Ann. 934; *State v. Kuhl*. — N. J. —, 17 Atl. Rep. 102.

<sup>2</sup> *State v. Rareshide*, 83 La. Ann. 934. But see *Kroh v. Smoot*, 63 Md.

172; *Gould v. United States*, 19 Ct. Cl. 598.

<sup>3</sup> *State v. Rareshide*, 83 La. Ann. 934; *Kroh v. Smoot*, 63 Md. 172.

<sup>4</sup> *Kroh v. Smoot*, 63 Md. 172.

## CHAPTER V.

### OF ELECTION TO OFFICE.

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143. Primary Elections and Nominations may be regulated by Law.

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146. State may prescribe Qualifications.

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183. Election must be held by proper Officers.
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186. State may make reasonable Regulations.
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188. Voter must vote but once.
189. Voter need not vote the whole Ticket.
190. Usually required to vote by Ballot.
191. What constitutes Ballot.
192. Ballot implies Secrecy.
193. Statutes protecting the Secrecy of the Ballot.
194. Statute requiring distinctive Marks is unconstitutional.
195. "Written" Ballot includes printed one.
196. Ballot must contain but one Name for each Office.
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- § 199. Names must be clearly expressed.
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202. Perfect Ballot is conclusive Evidence of Voter's Intention.
203. Extrinsic Evidence to explain Ballot.
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209. Canvassing Boards bound by the Returns.
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211. Board can act but once.
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214. The Tribunal.
215. The Procedure — Statutory Remedies.
216. Where no statutory Method, *Quo Warranto* is the Remedy.
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234. Contestant must show that Irregularities affected Result.

235. Mandatory Provisions must be observed.

236. Effect of Intimidation or Violence.

237. Impeaching the Returns.

238. Correcting the Returns.

239. The Ballots as Evidence.

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241. Evidence of Election Officers.

§ 242. Evidence of the Voters.

243. Same Subject—Legal Voter not compelled to state how he voted.

244. Same Subject—Voter may disclose voluntarily.

245. Same Subject—Illegal Voter may be compelled to disclose.

246. Same Subject—Evidence of Voter's Statements as to his Vote.

247. Voter not voting not permitted to state how he would have voted.

248. When all Evidence fails, Election must be set aside.

§ 140. **What is meant by Election.**—But by far the largest number of public officers in the United States are selected for their respective positions by the direct choice of the people expressed in the manner, and at the time and place, which they themselves have, by their constitutions and laws, prescribed. This method of choice is ordinarily termed an election. It pervades the entire system of American popular government and may, indeed, be called its leading characteristic.

The government being created by the people and for their own protection and welfare, the power of determining in what manner and by whom its various functions shall be exercised is in the people themselves, and, unless they have expressly delegated to certain representative bodies or individuals the power to select and appoint the public agents, the right and authority of selection remains in them collectively, to be exercised by the accepted method of expressing the popular choice—an election.

§ 141. **Must be exercised in the legitimate Mode.**—"But," as has been well said by Judge COOLEY, "this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the times, and under the conditions which they themselves have prescribed and pointed out by the constitution, or which, consistently with



the constitution, have been prescribed and pointed out for them by statute; and if by any portion of the people, however large, an attempt should be made to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who, for the time being, represent legitimate government."<sup>1</sup>

§ 142. **Can be held only by legal Authority.**—It follows also that the people can be bound and their power delegated, only when they have conferred authority for holding the election, and when the authority is exercised at the time and place and in the manner agreed upon.<sup>2</sup>

§ 143. **Primary Elections and Nominations may be regulated by Law.**—Not only is it the right and province of the State to regulate and control the holding of the final election at which the people's choice is to be expressed, but it is also competent and proper for it to regulate the holding and conducting of the primary conventions and caucuses at which the nominations for office are made.<sup>3</sup>

§ 144. **Subdivision of the Subject.**—In determining the question of the validity and effect of elections, there may be considered: I. Voters and their qualifications. II. The election.

## I.

### VOTERS AND THEIR QUALIFICATIONS.

#### I. *The Power to Prescribe Qualifications.*

§ 145. **Right to vote is neither natural, absolute or vested.**—The right to vote or to exercise the privilege of the elective franchise is neither a natural, absolute nor vested right, but is

<sup>1</sup> Cooley's Constitutional Limitations, 5th ed. 747.

Davis, 9 Humph. (Tenn.) 208, 49 Am. Dec. 706.

<sup>2</sup> "The right to hold an election cannot exist, or be exercised without an express grant of the power to do so by the legislature." Brewer *vs.*

<sup>3</sup> Leonard *vs.* Commonwealth, 112 Penn. St. 607; *In re* House Bill, 9 Colo. 681.

purely conventional, and it may be enlarged or restricted, granted or withheld by the constitutional authorities at pleasure and with or without fault: for outside of society, and disconnected with government, no person either has, or can exercise, the elective franchise as a natural right and he only receives it upon entering the social compact, subject to such qualifications as the State may prescribe.<sup>1</sup>

§ 146. *State may prescribe Qualifications.*—Under our political system, the right and power to determine who shall be qualified to vote at popular elections resides with the people of the States.\* The constitution of the United States nowhere prescribes the qualifications of voters, nor has it reserved to the Congress the right to legislate upon the subject.\* It follows, then,

<sup>1</sup>Blair v. Ridgely, 41 Mo. 68, 97 Am. Dec. 248.

\*Blair v. Ridgely, 41 Mo. 68, 97 Am. Dec. 248; Minor v. Happersett, 21 Wall. (U. S.) 163; United States v. Cruikshank, 92 U. S. 549; United States v. Reese, 92 U. S. 214; Van Valkenburg v. Brown, 48 Cal. 48, 18 Am. Rep. 136; Anderson v. Baker, 23 Md. 581; Huber v. Reilly, 53 Penn. St. 122; Ridley v. Sherbrook, 8 Cold. (Tenn.) 569; State v. Staten, 6 Cold. (Tenn.) 238.

In Blair v. Ridgely, 41 Mo. 68, 97 Am. Dec. 248, the court by WAGNER, J., say: "The people, for political purposes, must be considered synonymous with qualified voters, and their very first act in the formation of a State government was to exclude from the right of suffrage more than three-fourths of the whole inhabitants. The exclusion of women, children and negroes is purely arbitrary, and fixed and regulated by law. If the power to regulate the internal government and police of the State resided in the people, and was their 'inherent, sole and exclusive right,' the conclusion is inevitable that it was their peculiar and ex-

clusive province to say and determine what should constitute any inhabitant of the State a qualified voter. The power must reside somewhere, and it can only be with the people, and they have always exercised it, both negatively and affirmatively.

It is not perceived that there is any restraint over the power on this subject—certainly not in the constitution of the United States, for there is not to be found in that instrument a single sentence, paragraph or word which gives the national government power over the qualifications of voters in any of the States. But the direct opposite is affirmed, in that clause cited in the former part of this opinion, which declares 'that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the States respectively or to the people.'"

\*In Minor v. Happersett, 21 Wall. (U. S.) 163, 170. Chief Justice WARREN, says: "The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. The

that it is the peculiar and exclusive province of the States to say and determine what shall constitute any inhabitant of the State a qualified voter.<sup>1</sup>

The only restriction placed by the constitution upon the power of the States thus to fix the qualifications of voters, is that imposed by the fifteenth amendment, that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude." With this exception, the right of the State to limit the right to vote to such persons as it deems expedient is supreme.<sup>2</sup> Nor is this right affected by the four-

members of the House of Representatives are to be chosen by the people of the States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the state Legislature, Const. Art. 1, § 2. Senators are to be chosen by the Legislatures of the States, and necessarily the members of the Legislature required to make the choice are elected by the voters of the State. *Ib.* Art. 1, § 3. Each State must appoint, in such manner as the Legislature thereof may direct, the electors to elect the President and Vice-President. *Ib.* Art. 2, § 2. The times, places and manner of holding elections for Senators and Representatives are to be prescribed in each State by the Legislature thereof, but Congress may at any time, by law, make or alter such regulation, except as to the place of choosing Senators. *Ib.* Art. 1, § 4. It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the state laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts."

<sup>1</sup> *Blair v. Ridgely*, 41 Mo. 68, 97 Am. Dec. 248.

<sup>2</sup> *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, where DEVER, J., says:

"The right or privilege of voting is a right or privilege arising under the constitution of each State, and not under the constitution of the United States. The voter is entitled to vote in the election of officers of the United States by reason of the fact that he is a voter in the State in which he resides. He exercises this right because he is entitled to by the laws of the State where he offers to exercise it, and not because he is a citizen of the United States. *United States v. Anthony*, 11 Blatch. (U. S. C. C.) 200. What are the rights of citizens of the United States as such, and not of citizens of particular States, need not be here considered. They have repeatedly been discussed and defined. *Corfield v. Coryell*, 4 Wash. C. C. 371; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Ward v. Maryland*, 12 Wall. 418, 480; *Slaughter-House Cases*, 16 Wall. 86.

The qualifications of voters are fixed by state legislation. The requisitions as to ownership of property, citizenship, sex and residence, in connection

teenth amendment. The "privileges and immunities of citizens of the United States" which are thereby protected, do not include the right to vote.<sup>1</sup>

§ 147. In the Territories Congress prescribes Qualifications.—But in the territories the rule is different. As is said in a leading case, "It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers or the making of its laws: and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the constitution, to the States and to the people thereof by whom that constitution was ordained and to whom, by its terms, all power not conferred by it upon the government of the United States was expressly reserved. The *personal and civil* rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their *political* rights are franchises which they hold as privileges in the legislative discretion of the United States."<sup>2</sup>

## 2. Constitutional Limitations upon the Power.

§ 148. State Legislature can not alter or augment Qualifications prescribed by State Constitution.—Where the qualifications

with the right of voting, vary with the constitutions or laws of the several States. However unwise, unjust, or even tyrannical its regulations may be or seem to be in this regard, the right of each State to define the qualifications of its voters is complete and perfect, except so far as it is controlled by the fifteenth article of the amendments of the constitution of the United States, which provides that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on

account of race, color, or previous condition of servitude.'

<sup>1</sup>Minor v. Happersett, 21 Wall. (U. S.) 162; Van Valkenburg v. Brown, 48 Cal. 48, 18 Am. Rep. 136.

<sup>2</sup>Matthews J., in Murphy v. Ramsey, 114 U. S. 15, 44, citing National Bank v. County of Yankton, 101 U. S. 129; American Ins. Co. v. Canter, 1 Pet. (U. S.) 511; United States v. Gratiot, 14 Pet. (U. S.) 526; Cross v. Harrison, 16 How. (U. S.) 164; Dred Scott v. Sandford, 19 How. (U. S.) 393.

of a voter have been prescribed by the constitution of the State, it is not competent for the legislature to add to or alter such qualifications, unless the power to do so has been conferred upon it by the constitution itself either expressly or by necessary implication.<sup>1</sup> The specification in the constitution is an implied prohibition against legislative interference.<sup>2</sup>

Thus where the constitution of the State provided that every white male citizen who shall have resided in the State during the six months immediately preceding any election should have the right to vote, a statute which enacted "that no person shall be deemed to have acquired a residence in any township, city or ward, so as to entitle him to vote therein, until he shall have been a *bona fide* inhabitant of such township, city or ward at least twenty days before the day of election," was held to be unconstitutional and void.<sup>3</sup> So where the constitution declared that

<sup>1</sup>Rison v. Farr, 24 Ark. 161, 87 Am. Dec. 52; Quinn v. State, 85 Ind. 485, 9 Am. Rep. 754; Barker v. People, 8 Cow. (N. Y.) 686, 15 Am. Dec. 322; People v. Canaday, 78 N. C. 198, 21 Am. Rep. 465; State v. Constantine, 42 Ohio St. 437, 51 Am. Rep. 833; Daggett v. Hudson, 43 Ohio St. 548, 54 Am. Rep. 832; White v. Commissioner, 18 Oreg. 317, 57 Am. Rep. 20, note; Kinneen v. Wells, 144 Mass. 497, 59 Am. Rep. 105; State v. Corner, 22 Neb. 265, 3 Am. St. Rep. 267; St. Joseph, &c., R. R. Co. v. Buchanan County Court, 39 Mo. 485; State v. Williams, 5 Wis. 308; State v. Baker, 88 Wis. 71; Monroe v. Collins, 17 Ohio St. 665; State v. Symonds, 57 Me. 148; State v. Staten, 6 Cold. (Tenn.) 238; Davies v. McKesby, 5 Nev. 869; McCafferty v. Guyer, 59 Penn. St. 109; Clayton v. Harris, 7 Nev. 64; Randolph v. Good, 3 W. Va. 551; Page v. Hardin, 3 B. Mon. (Ky.) 648; Thomas v. Owens, 4 Md. 189; State v. Tuttle, 53 Wis. 45; United States v. Slater, 4 Woods (U. S. C. C.) 356.

"Our government," says McCon-

nick, J., in the case last cited, "is founded on the elective franchise. The right to exercise this franchise is declared, defined and guarded by organic provisions superior to any of the departments of the government. The Legislature cannot enlarge or restrict it, and can only regulate it so far as their authority to do so is expressly or by necessary implication given in the constitution. Much less do the courts presume to restrict it by construction. On the contrary, the whole spirit of our institutions constrains the courts to give our organic provisions on the subject of the enjoyment of the right of suffrage such a construction, as will permit the most liberal exercise of this supreme right which is at all reasonably consistent with the terms of those provisions."

<sup>2</sup>Cooley's Constitutional Limitations, 5th ed. 78.

<sup>3</sup>Quinn v. State, 85 Ind. 485, 9 Am. Rep. 754; see also State v. Williams, 5 Wis. 308; State v. Tuttle, 35 Wis. 45.

every citizen who had resided in the county thirty days should be an elector, a statutory provision requiring ninety days' residence was held unconstitutional.<sup>1</sup> So where by the constitution every citizen with certain qualifications named was entitled to vote, a statute which provided that no person thereafter naturalized,—and by such naturalization becoming *eo instanti* a citizen,—should be entitled to be registered as a voter within thirty days after such naturalization, is void.<sup>2</sup>

Again where the constitution, as construed by the court, gave to each elector the right to vote for each officer whose election is submitted to the electors, a statute providing for the election of four officers but denying the right to any voter to vote for more than two candidates, is unconstitutional.<sup>3</sup> And where the constitution of the State provided that every free white male citizen of the age of twenty-one years who shall have been a resident of the State for six months should be deemed a duly qualified elector, a statute which requires that every voter shall, before voting, take an oath that he has not voluntarily borne arms against the United States or the State, nor aided the confederate authorities since April 18, 1864, can not be sustained.<sup>4</sup> And where the constitution denied the right to vote to one who had been engaged in rebellion, unless an amnesty had been granted him, a statute requiring every voter before registering to take an oath that he had not been voluntarily engaged in rebellion exceeds the constitutional requirements.<sup>5</sup> And an act which requires the voter to be a "taxable inhabitant" is invalid where the constitution does not prescribe a property qualification.<sup>6</sup>

But under a constitution requiring that a voter shall have paid all taxes required of him, a statute requiring him to pay a tax of one dollar in lieu of a poll-tax and to register, is not unconstitutional;<sup>7</sup> nor is an act requiring voters to pay their taxes before voting for certain officers, the offices not being constitutional offices.<sup>8</sup>

<sup>1</sup> *People v. Canaday*, 78 N. C. 198, 21 Am. Rep. 465.

<sup>2</sup> *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105.

<sup>3</sup> *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 883.

<sup>4</sup> *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52.

<sup>5</sup> *Davies v. McKeeby*, 5 Nev. 869.

<sup>6</sup> *St. Joseph &c. R. R. Co. v. Buchanan County Court*, 39 Mo. 485.

<sup>7</sup> *McMahon v. Mayor of Savannah*, 66 Ga. 217, 42 Am. Rep. 65.

<sup>8</sup> *Buckner v. Gordon*, 81 Ky. 665.

A law which requires the voter to take an oath to support the constitution of the United States and of the State does not restrict the right to vote, nor add to the qualifications fixed by the constitution and is not unconstitutional;<sup>1</sup> nor is an act requiring persons offering to vote to answer questions put to determine their qualifications.<sup>2</sup>

### 3. *The Requirement of Registration.*

§ 149. **Validity of Registration Laws.**—As a means of determining who possess the qualifications of voters, and of regulating the exercise of the right, statutes have been passed in many of the States requiring the names of those entitled to vote to be previously recorded by officers provided for that purpose. These laws are ordinarily known as *registration laws*, and the act of listing the names as *registration*.

Provision is made for such laws in the constitutions of several of the States,<sup>3</sup> but even where no such express provision is so made, it is now generally settled, although not without some dissent, that, in the absence of a constitutional prohibition,<sup>4</sup> it is within the power of the legislature to provide a just and reasonable registration law.<sup>5</sup>

<sup>1</sup> *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52.

<sup>2</sup> *State v. Lean*, 9 Wis. 279.

<sup>3</sup> In *Daggett v. Hudson*, 48 Ohio St. 548, 54 Am. Rep. 832, decided in 1885, *ATHERTON, J.* says: "Registration laws are in terms either authorized or required to be enacted by the constitutions of the following states: Alabama, Arkansas, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Rhode Island, South Carolina, Virginia and West Virginia. The constitutions of the following states are silent on the question: California, Connecticut, Delaware, Iowa, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, Ohio, Penn-

sylvania, Tennessee, Texas and Vermont."

<sup>4</sup> As in Texas, Art. VI. § 4.

<sup>5</sup> *Capen v. Foster*, 12 Pick. (Mass.) 485, 23 Am. Dec. 632; *Byler v. Asher*, 47 Ill. 101; *Edmunds v. Banbury*, 28 Iowa, 267, 4 Am. Rep. 177; *Auld v. Walton*, 12 La. Ann. 129; *Hyde v. Brush*, 84 Conn. 454; *State v. Baker*, 88 Wis. 71; *Patterson v. Barlow*, 60 Penn. St. 54; *Monroe v. Collins*, 17 Ohio St. 665; *Daggett v. Hudson*, 48 Ohio St. 548, 54 Am. Rep. 832; *State v. Butts*, 81 Kans. 587; *In re Polling Lists*, 13 R. I. 729; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 798; *State v. Corner*, 23 Neb. 265, 8 Am. St. Rep. 267; *People v. Kopplekom*, 16 Mich. 342; *McMahon v. Mayor*, 66 Ga. 217, 42 Am. Rep. 65; *Common-*

*Oapen v. Foster*,<sup>1</sup> decided by the supreme court of Massachusetts in 1832, is the leading case upon this subject, and the principles there laid down by Chief Justice SHAW have been generally approved. "The constitution," said he, "by carefully prescribing the qualifications of voters, necessarily requires that an examination of the claims of persons to vote, on the ground of possessing these qualifications, must at some time be had by those who are to decide on them. The time and labor necessary to complete these investigations must increase in proportion to the increased number of voters; and, indeed, in a still greater ratio in populous commercial and manufacturing towns, in which the inhabitants are frequently changing, and where, of necessity, many of the qualified voters are strangers to the selectmen.

If then, the constitution has made no provisions in regard to the time, place and manner in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects respecting the mode of exercising the right, in relation to which it is competent to the legislature to make suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right.

And this court is of opinion, that the provision in the general law regulating elections, and that in the act incorporating the city, which require that the qualifications of voters shall be previously offered and proved, in order to entitle them to vote, that their names shall be entered upon an alphabetical register or list of voters, is highly reasonable and useful, calculated to promote peace, order and celerity in the conduct of elections, and as such, to facilitate and secure the most precious right to those who are by the constitution entitled to enjoy it; that it cannot be justly regarded as adding a new qualification to those prescribed by the constitution, but as a reasonable and convenient regulation of the mode of exercising the right of voting, which it

*wealth v. McClelland*, 83 Ky. 686.  
*Contra*, *Dells v. Kennedy*, 49 Wis.  
555, 35 Am. Rep. 786; *White v. Com-*

*missioners*, 13 Oreg. 317, 54 Am.  
Rep. 832, note.

<sup>1</sup> 13 Pick. (Mass.) 485, 23 Am. Dec.  
632.



was competent to the legislature to make, and therefore that these legal enactments, not being repugnant to the constitution, are valid and binding laws, to which both voters and presiding officers at elections are authorized and bound to conform."

"Still," continued the learned judge, "if the provision of this law is such as to afford the voter no opportunity to know seasonably whether his name is on the list or not, and to have it inserted if previously omitted, it would constitute a serious objection to its validity."<sup>1</sup>

§ 150. **Same Subject—Supplying Omissions.**—Most of the registration acts provide for an opportunity of supplying, on the day of election, the failure or omission to register in individual cases where the voter, otherwise qualified, has been unable to register at the time prescribed, and in some cases such a provision has been held essential to the validity of the law.<sup>2</sup> Thus in one

<sup>1</sup>*Capen v. Foster*, 12 Pick. (Mass.) 485, 28 Am. Dec. 632.

<sup>2</sup>*State v. Corner*, 22 Neb. 265, 8 Am. St. Rep. 267, 84 N. W. Rep. 499; *Daggett v. Hudson*, 43 Ohio St. 548; 54 Am. Rep. 832, 8 North E. Rep. 538.

See also *Dells v. Kennedy*, 40 Wis. 555, 35 Am. Rep. 786, 6 N. W. Rep. 246; *White v. Commissioners*, 18 Oreg. 317, 54 Am. Rep. 832, note, 10 Pac. Rep. 484. In *Daggett v. Hudson* (1885), 43 Ohio St. 548, 54 Am. Rep. 832, 8 North E. Rep. 538, *ATHERTON, J.* gives the following synopsis of the laws of several of the States: "The Massachusetts registration statute, construed and favorably considered in *Capen v. Foster*, (12 Pick. [Mass.] 485, 28 Am. Dec. 631,) required lists to be made of all electors of each ward qualified to vote, and that no person should be entitled to vote whose name was not borne on the list. But it was especially required that the selectmen and assessors should be in session immediately before or on the day of

election, so as to give the voter an opportunity to then place his name on the lists if it had been omitted.

The Pennsylvania registry law provided that the assessors, on the first Monday of June, annually, should revise the transcripts received by the county commissioners and strike off those who have died or removed, and add to the list any one entitled. Copies of these lists are to be posted up where the elections are to be held by August 1st, and that an unregistered voter, otherwise qualified, could on election day make an affidavit of his qualifications, and prove by the affidavit of a qualified voter, his residence, and by filing the same could vote at the election. *In re* election of McDonough, 105 Penn. St. 488.

The registry law of Iowa prohibited all persons from voting unless the name appeared upon the registration list, but an elector, unregistered, but otherwise qualified, was permitted to vote upon a proper reason being furnished for not having registered in time, and furnishing the affidavit of

of the most recent cases it is said: "The true rule undoubtedly is, that the legislature may require registration under reasonable

a registered voter as to his proper residence. *Edmonds v. Banbury*, 28 Iowa, 267, 4 Am. Rep. 177.

The registry law of California, though prohibiting a citizen from voting whose name did not appear on the registry, yet permitted a qualified voter, though unregistered, on furnishing proofs of his right, and on the day of election furnishing the board of registration his affidavit setting forth satisfactory reasons why he did not register prior to the thirty days provided by law for registration before the election. *People v. Laine*, 88 Cal. 55; *Webster v. Brynes*, 84 Cal. 273.

The election law of New York, of 1865, provides that the board of registry shall be in session on the Monday before the election for the purpose of making corrections in and revising the lists of voters, and the act of 1873 provides the registry shall be completed on the Saturday before the election,—but neither of these acts has been subjected to judicial tests as to their constitutional validity.

The election law of Illinois prohibits the ballot of unregistered voters, except that it allows such voters, on making proof of their constitutional qualifications on election day, to vote without even requiring proof of a reason for not registering. *Byler v. Aaher*, 47 Ill. 101. (But the law was changed in 1885 and such registration on election day is not permitted. *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 North E. Rep. 596.)

The election law of Kansas provides for closing the registry ten days before the election, but permits the voter to register at all times during

the year except the last ten days. *State v. Butts*, 81 Kans. 587.

The registry act of Missouri requires the registration of voters to be completed ten days before the election, but the same simply follows the requirements of the constitution of the State.

In the State of Maine the select men are required to make lists of voters, and in towns of 500 electors the names of legal voters may be added during the three days next preceding the election and to the hour of five of the secular day prior to the election; and in towns of less population the selectmen must be in session on the day of election for the purpose aforesaid. *Rev. Stats. of Maine*, 95.

In New Jersey, in cities of over 100,000 population, no person is permitted to vote unless registered; but his name may be placed on the registration list upon the personal appearance of the elector before the board, or upon the production of his affidavit, or the affidavit of some other voter in the precinct, showing him to be a legal voter therein. *Revision of Statutes of New Jersey*, 864 §132.

In Maryland, a list is to be made of all legal voters by registration officers, and such lists are thereafter to be corrected, but the lists so made are declared to be the legal and qualified electors and entitled to vote at all future elections, and annual registration is not required. The statute provides, however, for making additions to and corrections of the lists within three days of the election. *Supplement to Maryland code*, 240 *et seq.*

In Alabama registration is required

restrictions as proof of the possession of the qualifications prescribed by the constitution, but that the voter shall have the right to prove himself to be an elector, register and vote at any time prior to the closing of the polls on election day. It would doubtless be competent to require more proof on that day than if the voter had previously registered, but it should be left within his power to furnish such proof, if it existed, and exercise his right."<sup>1</sup>

But in other cases such an opportunity has been held not to be indispensable, and where the law affords reasonable facilities for registration at the time prescribed, and where the time allowed for registration extends as near to the time for actually depositing the votes as is consistent with the necessary preparation for conducting the election in an orderly manner and with a reasonable scrutiny of the correctness of the list, an opportunity for registration upon the day of election can not, by the weight of authority, be considered imperative.\*

as a condition to vote, but the assistant registers are required to be present on election day, at the election precinct, to register such voters as may have failed to register on any previous day. Code of Alabama, 23, § 233.

In Mississippi registration is required, and the registration lists are to be kept by the Clerk of the Circuit Court, "and any person not on the lists may appear at any time before the clerk and be registered." Code of Mississippi.

The code of Arkansas provides for registration; but if the voter's name does not appear on the lists he may still vote by taking an oath showing to the satisfaction of the election judges he is a qualified voter. Arkansas Stat. 471, § 2,323.

<sup>1</sup> State v. Corner, 23 Neb. 265, 3 Am. St. Rep. 267, 34 N. W. Rep. 499.

\* People v. Hoffman, 116 Ill. 587, 56 Am. Rep. 793, 5 North E. Rep.

596; State v. Butts, 31 Kans. 537, 2 Pac. Rep. 618; Patterson v. Barlow, 60 Penn. St. 54; *In re Polling Lists*, 13 R. I. 729.

See also Kinneen v. Wells, 144 Mass. 497, 59 Am. Rep. 105.

In State v. Butts, 31 Kans. 537, 2 Pac. Rep. 618, the court per BREWER J. say: "Requiring a party to be registered is not, in any true sense, imposing an additional qualification, any more than requiring a voter to go to a specific place for the purpose of voting, or requiring him to prove, by his own oath or the oaths of the other parties, his right to vote when challenged, or than requiring a naturalized foreigner to present his naturalization papers. Each and all of these are simply matters of proof, steps to be taken in order to ascertain who are and who are not entitled to vote. Doubtless under the pretense of registration, and under the pretext of securing evidence of voters' qualifications, laws might be framed which would cast so

§ 151. **Same Subject—Regulations must be reasonable.**—It is, however, well settled that registration laws must be just, reasonable, uniform and impartial, and there is “no warrant for such an exercise of legislative power as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself.”<sup>1</sup> And, as is said by the supreme court of Pennsylvania, “it must be regulation purely, not destruction. If this were not

much burden as really to be imposing additional qualifications. As, for instance, suppose the law required all voters in the state to be registered on personal attendance at the state capitol, on the first day of the year, for every election taking place during the year. The legislature can not by in form legislating concerning rules of evidence, in fact overthrow constitutional provisions. *County Seat of Linn County, 15 Kans. 500.*

But where ample facilities for registering are furnished, and the opportunities for registering are continued down to within a reasonable time of the election day, then it can not be said that mere rules of evidence are abused. Neither is there any magic in the mere day of election. It seems to be conceded that proof can be required, provided only it is required on the day of election. But it is easy to conceive of many requirements in force only on the day of election, which would really be more burdensome, and more in fact like to additional qualifications, than anything contained in the statute in question. Suppose the law required every voter in the county to present himself on the day of election at the office of the county clerk, and obtain from him upon proper proofs a certificate of qualification; or suppose the law required him to remain in attendance at the polls from sunrise to sunset in order to give any one who desired an opportunity to challenge; or even

supposing every voter was required to produce a dozen affidavits in writing from as many different persons, showing age and residence, such as are among the qualifications of an elector: all these contemplate action on the day of election, and on that day alone; and they all bear upon the question of having the right to vote; and yet they would be clearly an abuse of rules of evidence. They would be more in the nature of additional qualifications than the simple matter of registry. It is true, isolated instances may occur where a party through absence or sickness is unable to register, and so loses his vote; but the same result may follow where any failure to produce the required evidence occurs. A naturalized foreigner may lose his naturalization papers, and the court where he was naturalized may be at the very extreme of the land, and so, for the lack of the legal evidence of his naturalization, he may lose his vote; but still in both cases, the matter is simply one of a lack of evidence. It is a mistake to suppose that there is any special virtue in the mere day of election. If the legislature has the right to require proof of a man's qualifications, it has a right to say when such proof shall be furnished, and before what tribunal; and unless this power is abused the courts may not interfere.”

<sup>1</sup> *Capen v. Foster, 12 Pick. (Mass.) 485, 23 Am. Dec. 632.*

an immutable principle, elements essential to the right itself might be invaded, frittered away or entirely excised under the name or pretense of regulation, and thus would the natural order of things be subverted by making the principal subordinate to the accessory."<sup>1</sup>

Thus in a recent case in Ohio it was held that a law which required registration as a prerequisite to the right to vote, but allowed voters only seven days within the year in which to register and correct the registration, and which made no provision for registration thereafter, nor for any excuse for not registering in time, nor any means whereby absentees could be subsequently registered, is unreasonable and invalid.<sup>2</sup>

So in a late case in Massachusetts a statute providing that no person thereafter naturalized in any court shall be entitled to be

<sup>1</sup> *Page v. Allen*, 58 Penn. St. 388, 96 Am. Dec. 272.

<sup>2</sup> *Daggett v. Hudson*, 43 Ohio St. 548, 54 Am. Rep. 332, "We have been unable to find any case," say the court, "where the registration act has been upheld as constitutional which contained provisions similar to our statute. The necessary absence of a voter, on the seven days provided in the statute for registration, either by sickness, business, imprisonment or other lawful reason, absolutely forfeits for the time being his constitutional right of suffrage. He can not anticipate expected absence, and register at an earlier period. He can not prove his right by his affidavit, or the affidavit of others, and excuse his personal presence at the place of registration. He can not on the day of election, or within five days prior thereto, by any proof of constitutional qualification, supply the want of former registration.

A foreigner who has taken out his first papers, and made his necessary declaration to become a citizen, and whose rights to full citizenship and the elective franchise will ripen dur-

ing the five days before or on the day of the election can not secure registration or the right to vote, because he can not prove in advance that the action of the court will naturalize him. \* \* \*

We believe it an easy task so to frame a registry law that, while protecting the election from fraudulent votes, and securing the integrity of the ballot, it will in no practical way impede or injuriously restrain the constitutional right of the voter. But in the language of *WELCH, J.* in *Monroe v. Collins*, 17 Ohio St. 666, the law must be reasonable, uniform, impartial and calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote. Believing the act in question unnecessarily, unreasonably and injuriously to impair and impede the right of suffrage to the voter who is necessarily absent at the time fixed by the act for registration, we are unanimously of opinion that we are compelled to declare it to be subversive of constitutional rights, and therefore void."

registered as a voter within thirty days of such naturalization, was held unreasonable and void.<sup>1</sup>

On the other hand, in a very recent case in Illinois, a statute which provided for registration and directed that registration should close three weeks before election was sustained. "If cases can be supposed," said the court, "where the 'three weeks' requirement will deprive qualified electors of the privilege of depositing their votes, cases can also be supposed where one day's requirement will work the same result. This mode of reasoning, carried out to its logical sequence, will make any kind of a registry law unconstitutional. For it would be a physical impossibility for the judges of election to receive the votes and make up the registry at the same time and on the same day. If the Legislature has the power to direct the registry to be completed before election day, and if, in its wisdom and under a sense of its responsibility to the people, it has said that three weeks before election is a reasonable date for the completion of the registry, shall this court substitute its judgment for that of the law-making power and say that a shorter time would have been more reasonable?"<sup>2</sup>

**§ 152. Same Subject—Increasing Period of Residence or other Qualifications.**—In accordance with principles previously considered it is settled that a registry law which, to entitle a person to registration, requires a previous residence at a place or for a time greater, different or other than that fixed by the constitution of

<sup>1</sup> *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105. "It undertakes," says the court, "to prevent a single class of citizens, namely, those who are naturalized, possessing all the qualifications established by the constitution of the commonwealth, from exercising the right with which that constitution invests them, for a period of thirty days, by forbidding the registrars of voters to register them during that period. All persons must stand equal before the law, and the statute, assuming them to be citizens, imposes this prohibition upon them

as citizens of a specified class. A statute regulating the exercise of the right of suffrage, or the ascertainment of the qualifications of voters, must not only be reasonable in its character, but uniform and impartial in its application. If it were possible to impose a period of probation upon all qualified citizens before they were entitled to exercise the privilege, it certainly is not possible under the constitution to select a single class and impose it on this class alone."

<sup>2</sup> *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793.

the State, or otherwise increases or changes the constitutional requirements, is unconstitutional and void.<sup>1</sup>

Thus where, by the constitution, a person, otherwise qualified, who had resided in the county for *thirty* days was entitled to vote, a registration law which required a residence of *ninety* days as a prerequisite to registration, was held invalid;<sup>2</sup> and so where the constitution requires but *ten* days' residence, and the registry law demands *twenty* days;<sup>3</sup> and so where the constitution permits all citizens, otherwise qualified, to vote, and the registry law excludes those who have become such by naturalization within thirty days prior to the election.<sup>4</sup>

§ 153. **Requirements as to Time, Place and Manner must be observed.**—The requirements of the statute as to the time, place and manner of effecting the registration must be substantially complied with. Slight variations by which no one was misled or prejudiced would be disregarded, but in matters of substance the method prescribed must be observed.<sup>5</sup>

Thus, says Mr. McCrory, the removal of the registration "to another place near by, of which all the voters have due notice, and upon which they act, is not fatal. But the removal to a place some distance away, of which sufficient notice is not given, and by means of which a portion of the electors are deprived of their rights, will render the registration void."<sup>6</sup>

§ 154. **Effect of Failure to register.**—The registration law, being found within the principles already considered, to be a valid enactment, it follows that, unless excused by some fact which the law itself deems sufficient, the voter must register if he would exercise his privilege. The fact that he is qualified must be evidenced by the proper registration, and where it is not so evidenced the failure must, where the opportunity for registra-

<sup>1</sup> *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465; *Page v. Allen*, 58 Penn. St. 338, 98 Am. Dec. 272, *State v. Williams*, 5 Wis. 308; *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105.

<sup>2</sup> *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465.

<sup>3</sup> *Page v. Allen*, 58 Penn. St. 338, 98 Am. Dec. 272.

<sup>4</sup> *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105.

<sup>5</sup> *State v. Commissioners*, 20 Fla. 859; *Newsom v. Earnhart*, 86 N. C. 891.

<sup>6</sup> *McCrory on Elections*, § 104; *Newsom v. Earnhart*, 86 N. C. 891.

tion is afforded, be attributed to the voter's own fault or neglect. As is said by a learned judge, "In such a case, if a voter be disfranchised, he is by his own omission a voluntary party to his disfranchisement."<sup>1</sup>

§ 155. **Effect where no Opportunity for Registration is provided.**—Where the statute requiring registration is imperative and declares that those who are not registered shall not be entitled to vote, the failure to register disqualifies the voter and renders his vote, if cast, of no account, notwithstanding the fact that his failure to register was occasioned by the neglect or refusal of the proper officers to provide the means for registration at the time and place prescribed.<sup>2</sup> All votes, therefore, cast

<sup>1</sup>State v. Baker, 88 Wis. 71, 28 Am. Dec. 948, note; State v. Hilman-tel, 21 Wis. 566; People v. Wilson, 63 N. Y. 186.

<sup>2</sup>"It appears from the finding in this case," said GRAVES J., "that there has never been any valid or complete registration of voters, or any legal board of registration in the township of Franklin, in the county of Houghton, since the organization of the township in 1864, and that at the general election on the 6th of November, 1866, in the several townships of said county, whereat the relator and respondent were respectively voted for, for the office of sheriff, a large number of electors, in said township of Franklin, without having been registered, for the reason that there was no acting board of registration, did nevertheless actually vote for the relator, and that the votes thus given, if allowed to him, would secure to him a majority, and, if disallowed, would leave him in a minority. The question, and the only question presented, therefore, for our consideration is whether the votes thus given for the relator were legally cast.

It is admitted that the act for the

registration of voters is valid; but it is argued that no one, otherwise qualified, can be deprived of his vote for being unregistered, when the officers designated to administer the act fail, for any cause, to provide a registry.

The essence of the argument is, that the right to vote results from the constitution, and that every provision of this act to preserve the purity of elections, which requires electors to be registered, and prohibits all voting without it, is always to be considered as subject to the tacit exception that the means for registration, in accordance with the act, are certainly provided.

It is not to be disguised that this reasoning has considerable strength, but it has failed, however, to satisfy us.

The statute in question is grounded upon the same article of the constitution which gives the right to vote, and its object, as expressly declared in the title is '*further to preserve the purity of elections, and guard against the abuses of the elective franchise, by a registration of electors.*'

In accordance with this declared object, the act proceeds to provide



by persons unregistered, though their default was owing to the failure by the proper officers to furnish an opportunity for registration, are to be thrown out in determining the result.<sup>1</sup>

The qualified voter may have a remedy by action, in a proper case, against the officers for not permitting him to register, or he may enforce performance of their duty by mandamus, but where the law is imperative, he can not vote if he is not registered.<sup>2</sup>

But not only are the votes of unregistered voters to be thrown out, but it has also been held that the failure to furnish the necessary opportunity for registration would vitiate the entire election, certainly where the number of voters thus practically disfranchised was so great as to materially affect the result.<sup>3</sup> If

for the organization of boards of registration, and to require the electors to register, and *expressly forbids all voting by persons not registered*. The administration of the statute is confided to the local officers elected by the people themselves, for the discharge of other municipal duties, and who may be compelled by law to act. It contemplates general obedience and continuous administration, and nowhere, in terms, makes any provision for its own nullification, either through violence or the negligent or wilful failure of officers to organize or preserve boards. It does not speak the language of a mere offer, or proposition to the electors, to register or not, but utters the language of law; *unconditional, absolute, imperative*; and declares, *that all who do not register shall not vote*.

If the Legislature had *expressly* declared that no one should be deprived of his vote for not registering whenever the means of registration should be unprovided, the statute must have been regarded as equivalent to a legislative proposition to the electors to register or not, as they should see fit; and the introduction of the same idea, by construction, would produce the same result.

That interpretation, then, which to make valid the votes of electors where there has been no registration, would make the act subject to an unexpressed condition, by means of which it could, at any time, be practically extinguished in whole townships, is manifestly opposed to the language and apparent scope, spirit and purpose of the law. Rejecting, then, as we must, this interpretation, we find that those votes upon which the relator has based his claim, were given and received in plain violation of law, and were consequently void." *People v. Kopplekom*, 16 Mich. 342.

And the same result was reached in *State v. Hilmantle*, 21 Wis. 566; *State v. Stumpf*, 23 Wis. 630.

But the effect upon the validity of the whole election was not considered in these cases.

See also *Zeiler v. Chapman*, 54 Mo. 502.

<sup>1</sup> *State v. Hilmantle*, 21 Wis. 566; *State v. Stumpf*, 23 Wis. 630; *People v. Kopplekom*, 16 Mich. 342; *Dale v. Irwin*, 78 Ill. 170; *State v. Albin*, 44 Mo. 346; *Zeiler v. Chapman*, 54 Mo. 502.

<sup>2</sup> *Davis v. McKeeby*, 5 Nev. 369; *People v. Kopplekom*, 16 Mich. 342.

<sup>3</sup> *Zeiler v. Chapman*, 54 Mo. 502;

this were not so, then dishonest election officers may utterly defeat the will of the people by declining to hold a registration in those localities where they may anticipate an unfavorable result.'

No election being thus had, the former officers would, where such is the provision, hold over.

§ 156. **Effect of defective Discharge of Duty by registering Officers.**—But assuming that the opportunity for registration has been provided and the voter has attempted, in good faith, to do what is required upon his part, but, through carelessness, inattention or willful neglect of duty upon the part of the registering officers, the requirements of the law are not complied with, shall the voter be disfranchised or his vote cast out?

Perry v. Whitaker, 71 N. C. 475; People v. Canaday, 78 N. C. 198, 31 Am. Rep. 465; McDowell v. Construction Co. 96 N. C. 514; 2 S. E. Rep. 351; State v. Albin, 44 Mo. 347.

"We adhere," says the court in Zeller v. Chapman, 54 Mo. 502, 505, "to the decisions of this court heretofore made on this registration law that no votes can be counted where they have not been registered; and therefore the circuit court decided correctly that the contestee was not elected because his majority was the result of counting non-registered votes. The act is peremptory on this subject, and requires registration before voting. But we do not concede that registration officers can defeat the will of the people by absenting themselves from the place of registration or resigning. If this can be done, elections are a farce dependent entirely on the officers selected to carry out the law. They may decline registration in a precinct which they know to be hostile to their views, and thus defeat the votes of all the qualified voters at said precinct. This is not the object of the registration law. We assume that a *bona fide* registra-

tion was designed, and every facility is afforded to attain this object.

Whilst, therefore, we hold, with the circuit court, that non-registered votes could not be counted, *we also hold* that the refusal to comply with the law on the part of the officers of registration rendered the election void, and that the contestor in this case was not elected. As the contestee in this case received the certificate of election and was commissioned, *prima facie* he was entitled to the office. A proceeding on the part of the state might have been instituted to oust him. There was really no election, as the officers appointed to supervise the registration failed or refused to perform their duty. It was never intended, we presume, to place it in the power of the registering officers to defeat the will of the electors by refusing or failing to perform the duties imposed on them by law. This would be an outrage on the principle of popular election, which the law concedes. The only effect of no registration in a case such as this, where no registration is possible, is to render the election a nullity."

In reply to this question it has been said that the provisions prescribing the method in which the registration officers are to perform their duty are to be regarded as *directory* merely and not *mandatory*,<sup>1</sup> and that, therefore, the votes of qualified voters, who have done all required of them to perfect their right, are not to be cast out nor the election rendered void, because the registration officers have omitted some of the details prescribed by law, or were not qualified, or have not acted in the mode required.\*

Thus in a leading case\* it appeared that the registers were imperfectly prepared; that the names of the voters were not alphabetically arranged; that their residences were omitted; and that the lists were not certified, filed or posted, as required by law; but these registers were actually used at the polls, were taken there on the morning of the day of election, lay upon the table in the usual manner and were referred to by the inspectors as the registration lists. No person voted whose name was not on the list, and none but legal voters voted under these lists. The court held that these votes were not to be discarded; that voters are not bound to examine the registers, and that voters who are on a register *de facto*, used by the inspectors at the election as official and valid, need not inquire further. "They may accept the registers *de facto*," said the court, "as they accept the inspectors *de facto*, and they are no more bound to inquire into the qualifications *de jure* of the registers than into the qualifications *de jure* of the inspectors. It is enough for voters to find at the election acting inspectors using actual registers *virtute officii*. They need look no further to see if their votes be challenged by statute. The statute can not challenge them without notice. Their constitutional right can not be baffled by latent official failure or defect. And the registry law sets no such trap, authorizes none such, for the constitutional right which it was passed to protect. \* \* \* It would be a fraud on the constitution to hold them disfranchised without notice or fault. They went to the election clothed with a constitutional right of which

<sup>1</sup> People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451.

\*State v. Baker, 38 Wis. 71, 23

Am. Dec. 648 note; People v. Wilson, 62 N. Y. 186.

<sup>2</sup>State v. Baker, 38 Wis. 71, 23 Am. Dec. 648 note.

no statute could strip them, without some voluntary failure on their own part to furnish statutory proof of right. And it would be monstrous in us to give such an effect to the registry law, against its own spirit and in violation of the letter and spirit of the constitution."

And so the provisions of a registry act that the board of registry shall organize and appoint a chairman, and that the members shall take the oath of office and shall certify the registers, are directory merely and not jurisdictional; and this is so although one section of the act expressly provides that "no vote shall be received unless the name of the person offering to vote is on the said register made and completed, as hereinbefore provided, preceding the election," and that "this section shall be taken and held by every judicial and other officer as mandatory and not directory; and any vote which shall be received by the said inspectors of election, in contravention of this section, shall be void, and shall be rejected from the count, in any legislative or judicial scrutiny into any result of the election."

"We are of opinion," said the court, "that by the true construction of that section the inspectors are prohibited only from receiving the votes of persons not registered prior to the election. The prohibition was designed to prevent unregistered voters from taking part in the election, and to compel registration to be made before the day of election, and not to make the right to vote, of persons whose names are on the lists prior to the election, to depend upon the fact of the inspectors having observed all the minute directions of the act in preparing the register.

In construing a statute, the intention of the law giver, when ascertained from a consideration of the whole act, is to prevail over the literal sense of particular words or clauses, and an intention is not to be imputed to the legislature which is unreasonable and contrary to justice and equity. To hold that the omission of the inspectors to organize the board of registry in precise accordance with the statute, or their failure to take the oath of office, or to certify the register, were jurisdictional defects which rendered the register void, and the whole vote of the ward illegal, would be to deprive citizens of the most important of their political rights without an opportunity to be heard."<sup>1</sup>

<sup>1</sup> People v. Wilson, 62 N. Y. 186.

#### 4. *The Qualifications Required.*

§ 157. **Usual Qualifications required.**—"The qualifications of voters," says Mr. McCrery,<sup>1</sup> "are not uniform in all the States, but they are similar. Among those which are generally required are the following:

1. Citizenship either by birth or naturalization.
2. Residence for a given period of time in the State, county and voting precinct.
3. Age. In all the States it is required that a voter shall have reached the age of twenty-one years.
4. In most of the States the right to vote is limited to males.
5. In some States the payment of taxes is made a qualification.
6. And in some States ownership of land.
7. Mental capacity."

It is proposed to notice each of these requirements briefly.

§ 158. 1. **Citizenship**—How "Citizen" compares with "Inhabitant" and "Resident."—The word citizen is used under varying circumstances in a variety of significations. In its broad and popular sense it includes all persons who are entitled to the benefit and protection of the laws.<sup>2</sup> Its political signification is somewhat less comprehensive. The fourteenth amendment of the constitution of the United States declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and for the present purpose this definition of "persons born or naturalized in the United States and subject to the jurisdiction thereof," may be accepted as sufficiently precise.

Within the scope of this definition, less than full citizenship is sufficient in many of the States, for it is a common provision that inhabitants of the State who have in good faith declared

<sup>1</sup> McCrery on Elections § 30.

<sup>2</sup> See Robinson's case, 181 Mass. 376, 41 Am. Rep. 239. Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am.

Rep. 536. In *Steketee v. Kimm*, 48 Mich. 323, CAMPBELL, J. says "In ordinary parlance all people are citizens."

their intention to become citizens, may, under certain restrictions as to residence and time, exercise the right to vote.<sup>1</sup>

It is not infrequently provided that one who has been an "inhabitant" or a "resident" of a certain district during a given period shall, if possessing the other qualifications, be considered an elector, and the question becomes important whether these terms necessarily embrace the idea of citizenship as above defined or whether an unnaturalized alien, otherwise qualified, is embraced within such a provision.

This question was elaborately considered in an early case<sup>2</sup> in Illinois and it was there held that the element of citizenship was not involved; that where the constitution declared that "all white male inhabitants, above the age of twenty-one years, having resided in the State six months next preceding election, shall enjoy the right of an elector," a person who has been such an inhabitant is entitled to vote and that it is "wholly unnecessary to enquire whether the elector was a citizen of the United States. Possessing the qualifications declared in the constitution and recapitulated in the law of elections, he should be deemed a qualified voter and admitted to vote, though not a citizen of the United States."

"The term inhabitant," says the court, "is derived from the Latin *habito*, and signifies to live in, to dwell in; and is applied exclusively to one who lives in a place, and has there a fixed and legal settlement. It embraces locality of existence. It refers to the place of a person's actual residence, and excludes the idea of an occasional or temporary residence; and, as used in the section referred to, (refers to) the place where the elector dwells at the time of voting."

And so in another case,<sup>3</sup> it is said "According to the common understanding, there is a plain difference between the meaning of the words *inhabitant* and *citizen*. The word *inhabitant* means one who dwells or resides permanently in a place or who has a fixed residence, as distinguished from an occasional lodger or visitor. A *citizen* is a native or naturalized person."

<sup>1</sup> See *State v. Smith*, 14 Wis. 497;  
*In re Wehlitz*, 16 Wis. 468; *In re*  
Conway, 17 Wis. 536.

<sup>2</sup> *Spragins v. Houghton* (1840), 8 Ill.  
877.

<sup>3</sup> *State v. Kilroy*, 86 Ind. 118.

This distinction has been adopted in other cases,<sup>1</sup> and it is certainly reasonable and just that where the people—in whom, as has been seen, rest the right and power of determining the qualifications—have deliberately chosen a term of narrower signification in conferring the right, it should not, for the purpose of defeating the right, be construed as synonymous with a term which demands more extended qualifications.

§ 159. 2. *Residence*.—One of the most common requirements is that the person offering to vote shall, for a given period, have been a resident of the district, as the State, county or township, within and for which the election is held.

The question of what constitutes residence is one of no little difficulty, but, in general terms, it may be said that a person's residence is the place of his domicile. Or, as was said in a leading case,<sup>2</sup> it is "that place where the elector makes his permanent or true home, his principal place of business, and his family residence, if he have one; where he intends to remain indefinitely, and without a present intention to depart, when he leaves it he intends to return to it, and after his return he deems himself at home."

Every person is deemed to have a domicile somewhere, and when it has been once acquired in a certain place it will be deemed to continue there until a new one has been acquired.<sup>3</sup> Tempor-

<sup>1</sup> *Smith v. Moody*, 26 Ind. 299; *Stewart v. Foster*, 2 Binn. (Penn.) 110; *McCarthy v. Froelke*, 68 Ind. 507.

In *Harvard College v. Gore*, 5 Pick. (Mass.) 370,—a case involving the question of jurisdiction in the probate of a will—PARKER, C. J. says "The term inhabitant, as used in our laws and in this statute, means something more than a person having a domicile. It imports citizenship and municipal relations, whereas, a man may have a domicile in a country to which he is an alien, and where he has no political relations."

<sup>2</sup> *Fry's Election Case*, 71 Penn. 802, 10 Am. Rep. 698. See also, *State v. Aldrich*, 14 R. I. 171; *Sturgeon v.*

*Korte*, 34 Ohio St. 525. As to the sufficiency of the residence in certain cases, see *Kellogg v. Hickman*, — Colo. —, 21 Pac. Rep. 825; *State v. Graham*, 23 Neb. 68; *Shepard v. Allen*, — Ill. —, 17 N. E. Rep. 756.

<sup>3</sup> *Harbaugh v. Cicott*, 33 Mich. 241; *Fry's Election Case*, 71 Penn. 802, 10 Am. Rep. 698; *Preston v. Culbertson*, 58 Cal. 198; *Thompson v. Ewing*, 1 Brewst. 103.

It does not, however, follow, "because a man must have a domicile somewhere, and that a domicile once gained remains until a new one is acquired, that a man must be entitled to vote somewhere, or that the right to vote at a particular poll, being once established, is pre-

ary absences, therefore, although frequent or long continued, will not, while the person has a continuous intention to return, deprive him of his domicile and right to vote,<sup>1</sup> even though he may have unlawfully voted while absent.<sup>2</sup>

Students at college who have taken up their permanent residence at the college town may, of course, vote there like other citizens.<sup>3</sup> So students who have been emancipated from their fathers' families and who have no residence elsewhere may, while residing at the college during the period of instruction, if otherwise qualified, vote there;<sup>4</sup> but if the student has not been emancipated, if he still claims his father's home as his own and expects to return there when his temporary absence at college shall terminate, he will not acquire a residence at the college and cannot vote there.<sup>5</sup>

sumed to continue until the right to vote elsewhere is shown. \* \* \*

Abandonment of a residence is instantaneous, and if it be, by a voter, of a residence in one voting district, at a date too near the election for the requisite intervening time of residence to be a voter in another voting district to which he has removed, the voter will be entitled to vote in neither voting district." *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349.

<sup>1</sup> Thus a resident and voter in Florida will not while living temporarily in Washington as a public officer, lose his residence in Florida. *Dennis v. State*, 17 Fla. 389. To like effect, *Wheat v. Smith*, 50 Ark. 266, 7 S. W. Rep. 161.

<sup>2</sup> *O'Hair v. Wilson*, 124 Ill. 351, 18 West. Rep. 883.

<sup>3</sup> *Pedigo v. Grimes*, 118 Ind. 148.

<sup>4</sup> *Sanders v. Getchell*, 76 Me. 158, 49 Am. Rep. 606; *Putnam v. Johnson*, 10 Mass. 488; *Lincoln v. Hapgood*, 11 Mass. 350; *Wilbraham v. Ludlow*, 99 Mass. 587.

<sup>5</sup> *Fry's Election Case*, 71 Penn. 303, 10 Am. Rep. 698; *Vanderpool v.*

*O'Hanlon*, 53 Iowa, 246, 36 Am. Rep. 216.

In *Opinion of Judges*, 5 Metc. (Mass.) 589, the court say: "If the student has a father living; if he still remains a member of his father's family; if he returns to pass his vacations; if he is maintained and supported by his father—these are strong circumstances repelling the presumption of a change of domicile. So if he have no father living; if he have a dwelling house of his own, or real estate of which he retains the occupation; if he have a mother or other connections, with whom he has been before accustomed to reside, and to whose family he returns in vacations; if he describes himself of such place, and otherwise manifests his intent to continue his domicile there—these are all circumstances to prove that his domicile has not been changed.

But if having a father or mother, they should remove to the town where the college is situated, and he should still remain a member of the family of the parent; or if having no parent, or being separated from his father's family, not being maintained or sup-



Contingencies of this nature have in some instances been anticipated by the constitution of the State. Thus it is provided in several States<sup>1</sup> that no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or while a student in any seminary of learning, or while kept in an almshouse or asylum at the public expense, or while confined in any public prison.

Notwithstanding such a provision as this, however, a person who attends a seminary of learning may gain the right to vote there if he intends to make that place his permanent residence independent of his sojourn there as a student.<sup>2</sup> So in the absence of a statute, a person does not forfeit his residence in a precinct in which he was a voter merely by becoming an inmate of a county poorhouse as a county charge,<sup>3</sup> nor does he acquire a residence at the poorhouse.<sup>4</sup>

In Ohio it was held that resident inmates of "The National Asylum for Disabled Volunteer Soldiers," established by Congress upon land acquired in that State by the United States, were not residents of the State and hence not entitled to vote as such, and that this was so though the inmate had been a resident of Ohio before becoming a resident inmate of the asylum.<sup>5</sup>

§ 160. 3. Age.—In all of the States the right to vote is limited to those who have attained the age of twenty-one years.<sup>6</sup>

Inasmuch as the law does not regard fractions of a day, an infant is deemed of age during the whole of the last day of his twenty-first year.<sup>7</sup>

ported by him; or if he has a family of his own, and removes with them to such town; or by purchase or lease takes up his permanent abode there without intending to return to his former domicile; if he depend upon his own property, income or industry for support, these are circumstances, more or less conclusive, to show a change of domicile, and the acquisition of a domicile in the town where the college is situated."

<sup>1</sup> As in New York, Illinois, Indiana, California, Michigan, Rhode Island, Minnesota, Missouri, Nevada, Oregon and Wisconsin.

<sup>2</sup> *Sanders v. Getchell*, 76 Me. 158, 49 Am. Rep. 606.

<sup>3</sup> *Dale v. Irwin*, 78 Ill. 170. See upon right of discharged paupers to vote: *Opinion of Judges*, 124 Mass. 596; *Re Registry Laws*, 10 Phila. 213.

<sup>4</sup> *Monroe v. Jackson*, 1 Bart. 98; *Covode v. Foster*, 2 Bart. 600; *Taylor v. Reading*, 2 Bart. 661; *Re Election Law*, 9 Phila. 497.

<sup>5</sup> *Sinks v. Reese*, 19 Ohio St. 306, 3 Am. Rep. 397.

<sup>6</sup> *McCrary on Elections*, § 80.

<sup>7</sup> *Coke*, Lit. 171, b; *Bac. Abr. Infantry A*; *Howard's Case*, 2 Salk. 625;

§ 161. 4. **Males only may vote.**—Except where their disability has been removed, the right of suffrage can not be exercised by women. Although women are citizens in the broad sense of that term, yet the right of suffrage is not co-extensive with citizenship.<sup>1</sup>

Neither was the right conferred by the fourteenth amendment of the constitution of the United States, for although it is thereby declared that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, and that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, yet inasmuch as the constitution does not define nor add to the privileges and immunities of citizens nor declare the right of voting to be one of them, and inasmuch as women did not possess the right before the amendment, it is plain that it is not conferred by the amendment.<sup>2</sup>

So, inasmuch as the right to determine the qualification of voters rests, as has been seen, with the people of the States, an express provision in a State constitution limiting the right to vote to male citizens, is not in conflict with the constitution of the United States.<sup>3</sup>

Constitutional amendments in several States confer the right, and as to non-constitutional offices the right may be conferred by statute.<sup>4</sup>

§ 162. 5. **Payment of a Tax.**—In several of the States the right to vote is limited to those who have paid a tax, varying in kind and amount with the several States.

Where the kind is not specified it may be a tax either upon

*Fitzhugh v. Dennington*, 2 Ld. Raym. 1004; *Anonymous*, 1 Ld. Raym. 480; *Herbert v. Turball*, 1 Keb. 589; *Wells v. Wells*, 6 Ind. 447; *Hamlin v. Stevenson*, 4 Dana (Ky.) 597; *State v. Clarke*, 8 Harr. (Del.) 557.

<sup>1</sup> *Minor v. Happersett*, 21 Wall. (U. S.) 162; *Van Valkenburgh v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *Spencer v. Board of Registration*, 1 McAr. (D. C.) 169, 29 Am. Rep. 582; *Bloomer v. Todd*, 3 Wash. 599.

<sup>2</sup> *Minor v. Happersett*, 21 Wall. (U. S.) 162; *Van Valkenburgh v. Brown*, 43 Cal. 43, 13 Am. Rep. 136.

Nor is it conferred by the fifteenth amendment: *Van Valkenburgh v. Brown*, *supra*.

<sup>3</sup> *Minor v. Happersett*, 21 Wall. (U. S.) 162.

<sup>4</sup> See *Belles v. Burr*, 76 Mich. 1; *Coffin v. Thompson*, 97 Mich. 188; *State v. Parry*, 52 Kan. 1; *People v. English*, 139 Ill. 622; *Plummer v. Yost*, 144 Ill. 68.

real or personal property;<sup>1</sup> but a tax can not be imposed at an irregular or unusual time merely for the purpose of creating the right to vote.<sup>2</sup> That the tax was illegally assessed, however, has been held not to deprive the party paying it of his right to vote;<sup>3</sup> nor does the fact that the tax was not paid by the voter in person if paid by his agent with authority either previously conferred or subsequently duly ratified.<sup>4</sup>

Tax requirements, however, must be uniform and not discriminate between voters by requiring one class to be tax-payers and not requiring it of others.<sup>5</sup>

§ 163. 6. **Ownership of Land.**—So that one is a tax payer or free-holder is, in many cases, made a qualification.

§ 164. 7. **Mental Capacity.**—It is expressly provided in several of the States<sup>6</sup> that idiots and lunatics may not exercise the right of suffrage, but even in the absence of such a provision it is believed that they are excluded.<sup>7</sup>

Where, however, the person is neither an idiot or lunatic, his vote is not to be rejected simply because he is a man whose mind is greatly enfeebled by age.<sup>8</sup>

As to the degree of proof required upon an allegation of mental unsoundness, the law is not settled, but the opinion has been expressed<sup>9</sup> that the test applied to the question of the competency of a person to make a will would be applicable.<sup>10</sup>

<sup>1</sup> *Catlin v. Smith*, 2 Serg. & R. (Penn.) 267.

<sup>2</sup> *Opinion of Judges*, 18 Pick. (Mass.) 575.

<sup>3</sup> *Humphrey v. Kingman*, 5 Metc. (Mass.) 162.

<sup>4</sup> *Humphrey v. Kingman*, 5 Metc. (Mass.) 162; *Re District Attorney*, 11 Phila. 645; *Gillin v. Armstrong*, 12 Phila. 626.

<sup>5</sup> *Lyman v. Martin*, 2 Utah, 186.

Upon the general subject see also: *Re Providence Voters*, 18 R. I. 787; *Re Voting Laws*, 12 R. I. 586.

A city law requiring voters to pay a poll tax is not in violation of the constitution as imposing an additional qualification. *McMahon v. Mayor*, 66 Ga. 217, 42 Am. Rep. 65.

<sup>6</sup> As in Alabama, Arkansas, California, Delaware, Florida, Iowa, Kansas, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, Virginia, West Virginia and Wisconsin.

<sup>7</sup> *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 897; *Clark v. Robinson*, 88 Ill. 498. *Cooley's Const. Lim.* (5th ed.) 753.

<sup>8</sup> *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 897.

<sup>9</sup> *Mr. McCrary* in his work on Elections, § 80.

<sup>10</sup> In *Clark v. Robinson*, 88 Ill. 498, it was held that a person who is capable of doing ordinary work and transacting business, who knows money

In Connecticut capacity to read is required, and in Massachusetts capacity to read and write.

### 5. *Forfeiture of Right.*

§ 165. State may prescribe Forfeiture of Franchise as Punishment for Crime.—As has been seen in an earlier section, the right and power to determine who shall exercise the right to vote rest with the people of the State.<sup>1</sup> As has also been seen, the right to vote is not a natural or absolute right, nor is it a necessary incident of citizenship.<sup>2</sup> It is, therefore, not only competent for the State to declare to whom it shall be entrusted, but also to provide for its withdrawal for such causes as it deems sufficient.<sup>3</sup> Hence, several of the States have provided that guilt or conviction of certain crimes should operate to exclude the convicted or guilty person from the further exercise of the right.<sup>4</sup>

Thus it has been provided that all persons who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery or other crime punishable by imprisonment in the penitentiary;<sup>5</sup> persons convicted of infamous

and its value, makes his own contracts and does his own trading, or a person vacillating and easily persuaded, or a person who has been laboring under some kind of illusion or hallucination, but not so as to incapacitate him for the general management of business, which illusion or hallucination is not shown to extend to political matters, can not be denied the privilege of the elective franchise on the ground of a want of mental capacity.

<sup>1</sup> See *ante* § 146.

<sup>2</sup> *Minor v. Happersett*, 21 Wall. (U. S.) 162.

<sup>3</sup> *Barker v. People*, 8 Cow. (N. Y.) 686, 15 Am. Dec. 322; *Anderson v. Baker*, 23 Md. 531.

<sup>4</sup> See *Barker v. People*, 8 Cow. (N. Y.) 686, 15 Am. Dec. 322; *State v. Symonds*, 57 Me. 148; *Huber v. Relly*, 53 Penn. 112; *Anderson v.*

*State*, 72 Ala. 187; *State v. Buckman*, 18 Fla. 267; *Jones v. Registrars*, 56 Miss. 766; *United States v. Barnabo*, 14 Blatchf. (U. S. C. C.) 74; *Barker v. People*, 20 Johns. (N. Y.) 457; *Cawley v. People*, 95 Ill. 249; *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52; *State v. Staten*, 6 Cold. (Tenn.) 233; *Gandy v. State*, 10 Neb. 243; *People v. Cornell*, 16 Cal. 187.

<sup>5</sup> *Anderson v. State*, 72 Ala. 187. Under such a provision the grade of a larceny committed is not material. *Anderson v. State*, *supra*; *State v. Buckman*, 18 Fla. 267. See *Anderson v. Winfree*, — Ky. —, 4 S. W. Rep. 351.

Under such a provision it has been held that conviction of a crime "punishable" by imprisonment in the penitentiary forfeits the right to vote whether that punishment be actually inflicted or not. *United States v.*

crimes;<sup>1</sup> persons who have deserted from the military or naval service of the United States;<sup>2</sup> persons who are defaulters of public money;<sup>3</sup> persons who have participated or aided in fighting duels;<sup>4</sup> and others, shall not be permitted to vote.

§ 166. This is not a "cruel or unusual Punishment."—Such a penalty can not be deemed a "cruel or unusual" punishment within the meaning of a constitutional provision prohibiting punishments of that nature.<sup>5</sup>

§ 167. Evidence required—Conviction—Due Process of Law.—Where, by the terms of the law, the *conviction* of the voter is to operate as his disfranchisement, the fact of the conviction is a necessary prerequisite to the operation of the law.<sup>6</sup> Where, however, the commission of an act or the being guilty of an offense is the cause prescribed, it is held by the weight of authority that the voter can not be deprived of his right until the existence of the disfranchising fact shall have been established by due course of law.<sup>7</sup> Whether or not the fact exists is a judicial question and can not be determined by the officers of election.<sup>8</sup>

Watkins, 7 Sawy. (U. S. C. C.) 85. But *contra* it has been held that the punishment actually inflicted is the test of the disfranchisement, and not the mere liability to such punishment. Gandy v. State, 10 Neb. 243; People v. Cornell, 16 Cal. 187.

<sup>1</sup>As to what offenses are infamous, see *Ex parte* Wilson, 114 U. S. 417; Mackin v. United States, 117 U. S. 848.

<sup>2</sup>Huber v. Reilly, 53 Penn. 112; State v. Symonds, 57 Me. 148. Deserter must be convicted by court martial. McGafferty v. Guyer, 59 Penn. St. 109.

<sup>3</sup>Cawley v. People, 95 Ill. 248.

<sup>4</sup>See Barker v. People, 20 Johns. (N. Y.) 457; Royall v. Thomas, 28 Gratt. (Va.) 180, 26 Am. Rep. 335.

<sup>5</sup>Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; Barker v. People, 20 Johns. (N. Y.) 457; Huber v. Reilly, 53 Penn. 112.

<sup>6</sup>See United States v. Watkins, 7 Sawy. (U. S. C. C.) 85; Commonwealth v. Walter, 33 Penn. 105, 24 Am. Rep. 154; Goetschus v. Matheson, 58 Barb. (N. Y.) 152; State v. Humphreys, — Tex. —, 12 S. W. Rep. 99.

<sup>7</sup>Huber v. Reilly, 53 Penn. 112; State v. Symonds, 57 Me. 148; State v. Staten, 6 Cold. (Tenn.) 233.

<sup>8</sup>Burkett v. McCarty, 10 Bush (Ky.) 758.

Under the constitution and statutes of Virginia, no person who has engaged or shall engage in a duel is allowed to hold office. *Held*, that one who has been so engaged may be removed from office by *quo warranto* or an information in the nature of *quo warranto* without a previous conviction of the offense in criminal proceedings. Royall v. Thomas, 28 Gratt. (Va.) 180, 26 Am. Rep. 335.

So where a state constitution pro-

§ 168. Disability may be removed by Pardon.—An absolute and unconditional pardon granted by the power having the requisite authority relieves the person to whom it is granted from the consequences of his offense and restores him to his civil rights. As is said by a learned judge, "In contemplation of law, it so far blots out the offense that afterwards it can not be imputed to him to prevent the assertion of his civil rights. It gives to him a new credit and capacity and rehabilitates him to that extent in his former position."<sup>1</sup> He may thereafter vote or hold office as before.<sup>2</sup>

## II.

### THE ELECTION.

§ 169. In General.—Having thus determined who are qualified to vote at an election, it now becomes important to consider the time, place and manner of exercising the right and the results that are to ensue therefrom. In this connection it will be obvious that there are a number of questions important to be determined, as—

1. The authority for holding the election;
2. The notice to be given of it;
3. The time of holding the election;
4. The place of holding the election;
5. Election boards and officers;
6. The method of voting;

vided that any candidate for office who should be guilty of bribery should be disqualified from holding office, it was held that an officer might be removed by *quo warranto* for obtaining his election by bribery, without having been first convicted of the offense on an indictment, but *semble* that the defendant had a right to have the issues of fact raised upon the *quo warranto* tried by a jury. *Commonwealth v. Walter*, 88 Penn. 105, 24 Am. Rep. 154.

<sup>1</sup> FIELD, J., in *Knote v. United States*, 95 U. S. 149.

<sup>2</sup> *Ex parte Garland*, 4 Wall. (U. S.) 333; *United States v. Padelford*, 9 Wall. (U. S.) 531; *United States v. Klein*, 13 Wall. (U. S.) 128; *Carlisle v. United States*, 16 Wall. (U. S.) 147; *Wood v. Fitzgerald*, 8 Oreg. 568; *Jones v. Registrars*, 56 Miss. 766; *Perkins v. Stevens*, 24 Pick. (Mass.) 277; *People v. Pease*, 8 Johns. (N. Y.) Cases 333; *In re Deming*, 10 Johns. (N. Y.) 238.

7. What constitutes an election;
8. The canvass and returns;
9. Contested elections.

### 1. *Authority for Holding the Election.*

§ 170. **Election must be authorized by Law.**—It will be evident from the very nature of the case and the consideration already had, that public rights and authority can be acquired only by virtue and in pursuance of some fundamental law by which the people, who are the source of power, have consented to be bound. Elections can not be held and offices acquired at the mere option of the office seeker. In order, therefore, to the holding of a valid election, authority so to hold it must be found conferred by the people, either directly through the constitution, which they have themselves ordained, or indirectly, through the enactments of their legal representatives, the legislature. Without such authority, no election, except it be one held with the unanimous consent of all persons entitled to participate, can be of any legal importance.<sup>1</sup>

§ 171. **Same Subject—Contingent Elections.**—So if the election be one which is to be held only upon a certain condition or the happening of a given event, as in case of a municipal election only where the proper municipal officers shall decide to hold the election, it is obvious that unless the condition is performed or the contingency happens, as, in the case mentioned, only when the municipal officers do decide to call the election, any election attempted to be held must be of no avail.<sup>2</sup> For the same reason, if an election is to be held only in case of a proclamation to that effect, it can not be held if the proclamation is not made.<sup>3</sup>

<sup>1</sup> *Brewer v. Davies*, 9 Humph. (Tenn.) 208, 49 Am. Dec. 706; *McKune v. Weller*, 11 Cal. 49, 70 Am. Dec. 754; *People v. Martin*, 12 Cal. 409; *Sawyer v. Haydon*, 1 Nev. 75; *State v. Collins*, 2 Nev. 351; *State v. Robinson*, 1 Kans. 17; *State v. Jenkins*, 48 Mo. 261; *Matthews v. Commissioners*, 84 Kans. 606, 9 Pac. Rep. 765.

<sup>2</sup> *Opinion of Judges*, 7 Mass. 533; *Opinion of Judges*, 15 Mass. 537.

<sup>3</sup> *Stephens v. People*, 89 Ill. 387; *People v. Porter*, 6 Cal. 26; *McKune v. Weller*, 11 Cal. 49; *People v. Martin*, 12 Cal. 409; *Jones v. State*, 1 Kans. 273; *Barry v. Lauck*, 5 Cold. (Tenn.) 588. "Where the time and place of an election are not fixed by law," says *SHELDON, J.*, in *Stephens*

## 2. *Notice of the Election.*

§ 172. **Necessity of Notice.**—The laws regulating the calling and holding of elections usually provide that notice thereof shall be given in a manner and at a time therein prescribed, and, in general terms, it may be said that notice *of some kind* is essential to the validity of the election.<sup>1</sup>

But whether the exact notice prescribed by the law is indispensable, and whether there is the same necessity for express notice in all classes of elections, are questions to be considered.

§ 173. **General Elections—Time and Place fixed by Law—Provisions directory.**—The time and place of holding general elections are ordinarily fixed by the public laws which authorize them to be held, and of these public laws, and hence of the time and place fixed thereby, the people are bound to take notice and are presumed to have knowledge. Under these circumstances, provisions in the law for giving notice are presumed to be in addition to that which the law itself gives, and designed to give greater publicity to the fact and to act as reminders to the people of rights and duties already known by them.

The right and duty to hold the election in such a case is derived from the law and not from the notice, and it has, therefore, been held in a number of cases that the provisions for giving notice are to be regarded as directory only rather than as jurisdictional, and that the election will not be rendered invalid because of a failure to give the notice as prescribed.<sup>2</sup> Were it otherwise, the power of holding regular elections would be entirely dependent upon the ignorance or lawlessness of the officers charged with the duty of giving the notice.

<sup>1</sup> *v. People*, 89 Ill. 337, "but the election is only to be called, and the time and place to be fixed, by some authority named in the statute after the happening of some condition precedent, we regard it as essential to the validity of such an election that it be called, and the time and place thereof fixed, by the very agency designated by law and none other."

See also *Toney v. Harris*, — Ky. —, 8 S. W. Rep. 614.

<sup>2</sup> See *State v. Tucker*, 32 Mo. App. 620; *Bean v. County Court*, 33 *Id.* 635.

<sup>3</sup> *Stephens v. People*, 89 Ill. 337; *State v. Orvis*, 20 Wis. 235; *People v. Hartwell*, 13 Mich. 508, 86 Am. Dec. 70; *State v. Jones*, 19 Ind. 421, 81 Am. Dec. 408; *People v. Witherell*, 14 Mich. 43.



§ 174. **Same Subject—Filling Vacancies required to be filled at “next general Election.”**—The same rule applies to vacancies which the law requires to be filled at the next general election, the time and place of which are fixed by law. Here though the law declares that notice shall be given specifying the vacancy to be filled, an election at the time and place fixed by law has been held to be valid although no notice was given.<sup>1</sup>

In a leading case in New York it was held that where the vacancy was required to be filled at the next regular election, an election at that time was valid though the vacancy occurred so late that notice could not be given of it, and although only a small portion of the voters knew of the vacancy or cast their votes to fill it.<sup>2</sup>

But in other cases an election to fill a vacancy of which no notice was given, and which was, in fact, known to but few of the voters, has been held void.<sup>3</sup>

Though the notice were not given in the form prescribed by the law, yet if the election has been held, and the great body of the voters had notice *in fact* of the vacancy, this coupled with the fact that they are presumed to know that the law requires the vacancy to be filled at the next election would seem to be sufficient,<sup>4</sup> even though many refrained from voting because of a difference of construction of the law.<sup>5</sup> “But where,” as is said by a learned judge, “there was no notice, either by proclamation or in fact, and it is obvious that the great body of the elec-

<sup>1</sup> People v. Cowles, 18 N. Y. 350; People v. Hartwell, 13 Mich. 508, 86 Am. Dec. 70; Dishon v. Smith, 10 Iowa, 212; State v. Orvis, 20 Wis. 285; State v. Goetze, 22 Wis. 863; State v. Jones, 19 Ind. 356, 81 Am. Dec. 408.

<sup>2</sup> People v. Cowles, 18 N. Y. 350. This case is considered and denied in People v. Weller, 11 Cal. 49, 70 Am. Dec. 754, and distinguished in People v. Orissey, 91 N. Y. 616.

<sup>3</sup> Beal v. Ray, 17 Ind. 550; People v. Porter, 6 Cal. 26; People v. Weller, 11 Cal. 49, 70 Am. Dec. 754; People v. Martin, 12 Cal. 409; People v.

Rosborough, 29 Cal. 415; Bolton v. Good, 41 N. J. L. 296.

<sup>4</sup> Foster v. Scarff, 15 Ohio St. 532. In this case the court say: “We have no doubt that where an election is held in other respects as prescribed by law, notice *in fact* is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election would be valid.” To same effect:—Commonwealth v. Smith, 182 Mass. 289; Dishon v. Smith, 10 Iowa 212; State v. Skirving, 19 Neb. 497.

<sup>5</sup> Jones v. Gridley, 20 Kans. 534.

tors were misled for want of the official proclamation, its absence becomes such an irregularity as prevents an actual choice by the electors,—prevents an actual election in the primary sense of that word,—and renders invalid any semblance of an election which may have been attempted by a few, and which must operate, if it operate at all, as a surprise and fraud upon the rights of the many.”<sup>1</sup>

Certainly in such a case if the body of voters who were unnotified was so great that they might have changed the result, the election ought not to stand.

§ 175. **Same Subject—Vacancies not required to be so filled.**—But where the vacancy is one not required to be filled at the next general election, although it *may* be so filled, it is held that an election held without notice, either such as is prescribed by law or notice in fact, and in which the great body of the voters have not participated, is void.<sup>2</sup>

What was said in the preceding section as to the kind of notice required, would apply here. If the great body of the electors actually had notice and the election were held, it could scarcely be assailed unless the number of voters unnotified were sufficient to change the result.

§ 176. **Special Elections—Notice requisite.**—Where the time and place are not fixed by law, and in the case of special elections not occurring at regular or fixed periods, but only upon the happening of a contingency, notice is indispensable, and an election held without it would be void.<sup>3</sup>

So when a special election is called for a specific purpose, notice of the purpose should also be given.<sup>4</sup>

<sup>1</sup> BRINERHOFF, J., in *Foster v. Scarff*, 15 Ohio St. 532.

<sup>2</sup> *Secord v. Foutch*, 44 Mich. 89; *Cook v. Mock*, — Kans. —, 20 Pac. Rep. 259; *Ward v. Clark*, 85 Kans. 815, 10 Pac. Rep. 837; *State v. Sherman Co.*, 39 Kans. 293, 18 Pac. Rep. 179; *Jones v. State*, 1 Kans. 378; *Wood v. Bartling*, 16 Kans. 109.

<sup>3</sup> *Kenfield v. Irwin*, 53 Cal. 164; *Morgan v. Gloucester*, 44 N. J. L. 137; *Hubbard v. Williamstown*, 61 Wis. 397; *People v. Crissey*, 91 N. Y. 616; *Haddox v. Clarke County*, 79 Va. 677.

<sup>4</sup> *St. Louis, &c. Ry. Co. v. Epperson*, — Mo. —, 10 S. W. Rep. 478.

### 3. *Time of Holding the Election.*

§ 177. **Time must be fixed by Law.**—It is evident that a fixed and ascertained time for holding the election is indispensable to the full and effectual exercise of the right to vote. And this time must be fixed by authoritative power,—either the people in their constitution and laws in the case of regular elections,<sup>1</sup> or the executive or other designated power in the case of special elections.<sup>2</sup>

§ 178. **Election must be held at Time fixed.**—Enactments declaring the time at which the election shall be held are deemed to be matters of substance and must be substantially observed or the election will be void.<sup>3</sup> At the same time, a substantial observance is sufficient and slight variations will not invalidate.

Thus a failure to hold the election at all until several days after the time fixed,<sup>4</sup> or not opening the polls until two o'clock in the afternoon where the law required them to be opened between the hours of six and seven in the morning;<sup>5</sup> or allowing only forty minutes for voting where the law contemplates three hours,<sup>6</sup> have been held to invalidate the election.

But, on the other hand, closing the polls a few minutes or an hour before the time fixed, will not invalidate where no one offered to vote after the polls were closed;<sup>7</sup> but it will if votes are thereafter offered and rejected, in sufficient numbers that they might have changed the result.<sup>8</sup>

So keeping the polls open a short time after the hour fixed will not invalidate<sup>9</sup> unless enough votes were afterwards received to change the result.<sup>10</sup>

<sup>1</sup> *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Brewer v. Davis*, 9 Humph. (Tenn.) 208, 49 Am. Dec. 706.

<sup>2</sup> When the statute prescribes that the date of holding the election shall be fixed by a certain agency, it is essential that the date be fixed by that agency and none other. *Stephens v. People*, 89 Ill. 837.

<sup>3</sup> *Dickey v. Hurlburt*, 5 Cal. 348; *Melvin's Case*, 68 Penn. 333; *People*

*v. Murray*, 15 Cal. 221; *Toney v. Harris*, — Ky. —, 3 S. W. Rep. 614.

<sup>4</sup> *Pratt v. Swanton*, 15 Vt. 147.

<sup>5</sup> *Melvin's Case*, 68 Penn. 333.

<sup>6</sup> *State v. Wollem*, 37 Iowa, 131.

<sup>7</sup> *Cleland v. Porter*, 74 Ill. 76, 24 Am. Rep. 273.

<sup>8</sup> *State v. Wollem*, 37 Iowa 131;

*Cleland v. Porter*, 74 Ill. 76, 24 Am. Rep. 273.

<sup>9</sup> *Sweepston v. Barton*, 39 Ark. 549.

<sup>10</sup> *Piatt v. People*, 29 Ill. 54; *Locust Ward Election*, 4 Pa. L. J. 341.

Closing the polls an hour for dinner will not invalidate where no one was thereby denied the right to vote.<sup>1</sup> So where the polls are required to be open between 6 A. M. and 7 P. M. an election held from 7 A. M. to 7 P. M. is not defective.<sup>2</sup> And in general terms it may be said that irregularities which do not affect the result,—which do not deprive a legal voter of his right or admit a disqualified person to vote, which cast no uncertainty on the result and have not been occasioned by the agency of the party seeking to derive a benefit from them,—will be disregarded in determining the question of choice.<sup>3</sup>

§ 179. *Same Subject—Holding of Election prevented by Act of God.*—Where the people of a township were, with few exceptions, prevented by a great “blizzard” or storm from attending and participating in an election on the day fixed for it by law, and an act was afterwards passed by the legislature authorizing the election to be held upon a subsequent day, the persons elected on the latter day were held to have a good title to the offices.<sup>4</sup>

§ 180. *Same Subject—The Rules deduced.*—“From all the somewhat conflicting authorities upon the subject,” says Mr. McCRAE in his treatise on Elections, “the following may be gathered as the governing rules:—

1. If the statute fixing the hours during which the polls shall remain open expressly declares that a failure in this respect shall render the election void, it must be strictly enforced.

2. But in the absence of such a provision in the statute, it will be regarded as so far directory only, as that, unless the deviation from the legal hours has affected the result, it will be disregarded.

3. If the deviation from the legal hours is great, or even considerable, the presumption will be that it has affected the result and the burthen will be upon him who seeks to uphold the election to show affirmatively that it has not. But if the deviation from the legal hours is but slight, the presumption will be that it has not affected the result, and the burthen will be upon him

<sup>1</sup> *Fry v. Booth*, 19 Ohio St. 25; *Du Page County v. People*, 65 Ill. 360.

<sup>2</sup> *Clark v. Leathers*, — Ky. —, 5 S. W. Rep. 576.

<sup>3</sup> *People v. Cook*, 8 N. Y. 67, 50 Am. Dec. 451.

<sup>4</sup> *State v. Quinby*, — N. J. —, 17 Atl. Rep. 952.

who attacks the validity of the election, to show affirmatively the contrary.

4. If the number of votes illegally cast after the legal hours, and the persons for whom cast can be shown, they may be rejected from the count."<sup>1</sup>

#### 4. *Place of Holding the Election.*

§ 181. *Place must be fixed.*—It is also imperative that the place of holding the election shall be fixed, either by the general law or by the proclamation or notice by which the election is called. Without a place fixed and in a locality known to the voters, any attempt to hold an election must be unavailing.

§ 182. *What Deviation invalidates.*—Enactments fixing the place of holding the election are properly to be regarded as mandatory, and any substantial variation must invalidate the election.<sup>2</sup> At the same time, emergencies may arise, as a sudden fire or the destruction of the building, or the inadequacy of the quarters assigned, which will render some change in the location fixed indispensable.<sup>3</sup> And it is well settled that where such a necessity arises and the removal is prompted by proper motives, a removal of the polls to some other appropriate place in the same

<sup>1</sup> § 180.

<sup>2</sup> *Melvin's Case*, 68 Penn. 888; *Walker v. Sanford*, 78 Ga. 165, 1 S. E. Rep. 424; *Dickey v. Hurlburt*, 5 Cal. 848; *Knowles v. Yeates*, 81 Cal. 83.

In *Melvin's Case*, *supra*, the court, THOMPSON, C. J., says: "A fixed place, it seems to me, is as absolutely requisite according to the election laws, as in the time of voting. The holding of elections at the places fixed by law, is not directory; it is mandatory, and can not be omitted without error. I will not say that in case of the destruction of a designated building on the eve of an election, the election might not be held on the same or contiguous ground as a matter of necessity, *necessitas non*

*habet legem*. But there the necessity must be absolute, discarding all mere ideas of convenience."

<sup>3</sup> In *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711, DIXON, C. J., says: "If the room at which the election is called is small, inconvenient or inaccessible to large numbers, the electors, or a majority of those present, may adjourn to some other place where these objections do not exist, making public announcement thereof, and causing proper notice to be given to voters who shall come afterwards. This power, I have no doubt, is always possessed by the electors assembled on such occasions, unless expressly taken away by statute."

vicinity, of which adequate general notice is given, will not invalidate the result.<sup>1</sup>

### 5. *Election Boards and Officers.*

§ 183. **Election must be held by proper Officers.**—The laws providing for the calling and holding of elections usually provide that they shall be conducted by certain officers, elected or chosen by certain methods, and that the result shall be ascertained and published in a manner prescribed.

Regulations of this nature are indispensable to the orderly and efficient conduct of the election, and an election held by persons without any color of authority to do so, or without any attempt to observe the methods prescribed, is invalid.<sup>2</sup>

Where a special election is provided for, but no method of holding it is declared, it will be sufficient if held in the method prescribed for holding general elections.<sup>3</sup>

§ 184. **Regulations are directory and not mandatory.**—But while the manner of holding elections must be regulated, it is obvious that the manner prescribed is intended simply to secure the correct result, and that the manner is clearly subservient to the result. As is said by a learned judge: "In elections the great matter is the result. When this is clearly ascertained, it sweeps away all technicalities. The machinery provided should be observed, but in so far as it is not necessary to determine the

<sup>1</sup> *Farrington v. Turner*, 58 Mich. 72, 51 Am. Rep. 88; *Dale v. Irwin*, 78 Ill. 170; *Hawes v. Miller*, 56 Iowa 895; *Foster v. Scarff*, 15 Ohio St. 535; *Simons v. People*, 119 Ill. 617.

In *Dale v. Irwin*, 78 Ill. 170, an adjournment to a place not more than 100 feet distant, readily seen from the original polling place, and of which the voters had knowledge, did not invalidate, and in *Farrington v. Turner*, 58 Mich. 72, 51 Am. Rep. 88, an adjournment, for the purpose of accommodating the largest number of voters, from a school house in one district to another about eight

miles distant, a public announcement being made of the fact and a person being left at the original place to inform all comers of the change, was sustained, it not appearing that that the result was affected. But in another case a removal to a place several miles away was held to invalidate. *Knowles v. Yeates*, 81 Cal. 82.

<sup>2</sup> *Dally v. Esterbrook*, 1 Br. El. Cas. 299; *Franklin v. Kaufman*, 65 Ga. 260.

<sup>3</sup> *Wells v. Taylor*, 5 Mont. 202; *People v. Dutcher*, 56 Ill. 144.

result, it is directory and not mandatory. Certainly manner and form should not be allowed to defeat the undoubted will of the people clearly expressed. This would be indeed subordinating and sacrificing the substance to the shadow."<sup>1</sup>

In pursuance of this idea, therefore, it is generally held that the regulations prescribed are directory merely, and that a failure to observe them fully will not invalidate the election, where an election has been held in good faith and the irregularities do not affect the result.<sup>2</sup>

Thus the fact that the officers of election were not qualified to hold the position,<sup>3</sup> or that they had not been sworn,<sup>4</sup> or had not filed their oath<sup>5</sup> as required, or that they did not meet in the proper place,<sup>6</sup> nor certify the result in the proper form,<sup>7</sup> or that they were not lawfully chosen,<sup>8</sup> or that one of them could not read,<sup>9</sup> or was an alien,<sup>10</sup> or was the son-in-law of one of the candidates,<sup>11</sup> or was not a freeholder as required,<sup>12</sup> will not invalidate the election. The officers are at least officers *de facto*, and if the result has not been affected by these irregularities no one can complain.<sup>13</sup>

So that the officers have not in all things observed the methods prescribed in receiving the votes or making their returns is immaterial where there has been no fraud and the result is not changed.<sup>14</sup>

<sup>1</sup> SIMPSON, C. J., in *Trimmier v. Bomar*, 20 S. C. 354.

<sup>2</sup> *Trimmier v. Bomar*, 20 S. C. 354; *Rounds v. Smart*, 71 Me. 380; *Thompson v. Ewing*, 1 Brewst. 69; *Swepton v. Barton*, 39 Ark. 549; *Keller v. Chapman*, 34 Cal. 635; *Taylor v. Taylor*, 10 Minn. 107; *Whipley v. McKune*, 12 Cal. 352; *Sprague v. Norway*, 81 Cal. 173; *Collins v. Huff*, 63 Ga. 207; *Harding v. Colquitt*, 68 Ga. 588; *State v. Nicholson*, 102 N. C. 465, 9 S. E. Rep. 545; *Kellogg v. Hickman*, — Colo. —, 21 Pac. Rep. 325.

<sup>3</sup> *Swepton v. Barton*, 39 Ark. 549.

<sup>4</sup> *Rounds v. Smart*, 71 Me. 380; *Trimmier v. Bomar*, 20 S. C. 354; *Whipley v. McKune*, 12 Cal. 352.

<sup>5</sup> *Trimmier v. Bomar*, 20 S. C. 354.

<sup>6</sup> *Trimmier v. Bomar*, 20 S. C. 354.

<sup>7</sup> *Trimmier v. Bomar*, 20 S. C. 354.

<sup>8</sup> *Thompson v. Ewing*, 1 Brewst. 69; *Rounds v. Smart*, 71 Me. 380; *Keller v. Chapman*, 34 Cal. 635; *Sprague v. Norway*, 81 Cal. 173.

<sup>9</sup> *Sprague v. Norway*, 81 Cal. 173; *State v. Bernier*, — Minn. —, 38 N. W. Rep. 868.

<sup>10</sup> *Keller v. Chapman*, 34 Cal. 635.

<sup>11</sup> *Hardin v. Colquitt*, 68 Ga. 588.

<sup>12</sup> *Collins v. Huff*, 63 Ga. 207.

<sup>13</sup> *Swepton v. Barton*, 39 Ark. 549; *Quinn v. Markoe*, 37 Minn. 489, 35 N. W. Rep. 263.

<sup>14</sup> *Whipley v. McKune*, 12 Cal. 352, as if they permit the ballot box to be temporarily out of their custody, where no fraud or tampering are

But the absence of officers, whom the law expressly requires to be present, will invalidate the election.<sup>1</sup>

§ 185. *Same Subject—Depositing Ballot in the wrong Box.*—Where different officers, and particularly where different classes of officers, are to be voted for at the same election, it is common, to avoid confusion, to provide that votes for each officer or class of officers shall be deposited in a separate box.

This, however, is obviously a matter of regulation only, and if by the honest mistake of the voter, or through the error or even the fraud of the inspector, the ballot is deposited in the wrong box, this should not defeat it. The mistake is one easy of correction when the boxes are opened, and, if otherwise perfect, the ballot should be then deposited in the proper box and duly counted.<sup>2</sup>

But the inspectors have no right or authority, on the assertion of a voter that he has voted by mistake in the wrong precinct, to withdraw from the ballot box and destroy a ballot which he professes to identify as the one cast by him.<sup>3</sup>

## 6. *The Method of Voting.*

§ 186. *State may make reasonable Regulations.*—It is the undoubted right and duty of the State to make such reasonable regulations for the holding of elections and the voting thereat as shall best protect and preserve the right of the elector to exercise

shown: *People v. Nordheim*, 99 Ill. 558, as where the poll-book, by oversight, was not sealed, no advantage having been taken of it: *People v. Cook*, 14 Barb. (N. Y.) 259, as if the voters were sworn on a book other than the Bible, all supposing it to be the Bible: *O'Gorman v. Richter*, 81 Minn. 25, as where the ballots were not sealed up, but had been kept intact: *State v. Bernier*, — Minn. —, 38 N. W. Rep. 368, as where the poll list was not posted as required.

See also *State v. Burbridge*, —

Fla. —, 3 South. Rep. 869; *Varney v. Justice*, — Ky —, 6 S. W. Rep. 457; *Stemper v. Higgins*, 38 Minn. 222, 37 N. W. Rep. 95.

<sup>1</sup> *Walker v. Sandford*, 78 Ga. 165, 1 S. E. Rep. 424; *Franklin v. Kaufman*, 65 Ga. 280.

<sup>2</sup> *People v. Bates*, 11 Mich. 362, 63 Am. Dec. 745. See also *Lanier v. Gallatas*, 18 La. Ann. 175; *McKinney v. O'Connor*, 26 Tex. 5.

<sup>3</sup> *Harbaugh v. Cicott*, 33 Mich. 241.



his franchise.<sup>1</sup> Upon this ground, as has been seen, registration laws are enacted and sustained.<sup>2</sup>

Regulations for this purpose must, however, be reasonable in their requirements; they must, as a rule, be general and uniform in their operation, "operating upon all of a certain class, or upon all those who are brought within the relations and circumstances provided in the act;"<sup>3</sup> and they must not have the effect of depriving certain classes of citizens of their constitutional rights.<sup>4</sup>

§ 187. **Voter must vote in Person.**—At the common law voting by proxy was unknown, and this still remains the law unless changed by statute. The voter must, therefore, personally deposit his ballot.<sup>5</sup>

But upon the principle that what is done in one's presence and by his express direction is, in law, his act,<sup>6</sup> an infirm or aged voter may undoubtedly employ another to perform the mechanical act of depositing in the voter's presence the ballot which the latter has himself selected.<sup>7</sup>

§ 188. **Voter must vote but once.**—It is also a fundamental principle in all popular elections that each voter shall vote but once, at any election, for each office or measure to be voted for.

And if the voter has once voted, though by mistake he has voted in the wrong precinct, he has no right to vote again at the same election, and if he does so, his second vote should not be counted.<sup>8</sup>

§ 189. **Voter need not vote the whole Ticket.**—It is entirely optional with the voter whether he will vote at all or not, and, if

<sup>1</sup> See *Commonwealth v. McClelland*, 88 Ky. 686; *Davis v. School District*, 44 N. H. 898, 404; *State v. Butts*, 81 Kans. 587.

<sup>2</sup> See *ante*, § 149.

<sup>3</sup> *State v. Hunter*, 88 Kans. 578, 589; See *Wheeler v. Philadelphia*, 77 Penn. St. 388; *People v. Squire* 107 N. Y. 593; *State v. Berka*, 20 Neb. 375; *State v. Lawrence Bridge Co.* 23 Kans. 438; *State v. Mitchell*, 31 Ohio St. 592; *Burkholtz v. State*, 16 Lea (Tenn.) 71.

<sup>4</sup> Thus a law whose effect is to disfranchise illiterate persons can not be sustained. *Rogers v. Jacob*, — Ky. —, 11 S. W. Rep. 518.

<sup>5</sup> *Opinion of Judges*, 41 N. H. 551, 11 Am. Law Reg. 742; *People v. Blodgett*, 18 Mich. 127.

<sup>6</sup> See *Mechem on Agency*, § 93.

<sup>7</sup> *Opinion of Judges, supra*; *Clark v. Robinson*, 88 Ill. 498.

<sup>8</sup> *Harbaugh v. Cicott*, 88 Mich. 241.

he votes, he need not vote for every office to be filled at that election nor for every one of several joint candidates for the same office, but he may vote for such offices as he chooses and for such of the several persons to be chosen to the same office as he prefers.

§ 190. **Usually required to vote by Ballot.**—Voting for public officers is usually required to be by ballot, but in the absence of such a requirement, a vote *viva voce* or by show of hands or by any other means agreed upon, would undoubtedly be valid.

§ 191. **What constitutes Ballot.**—In the absence of a law prescribing the form, material and method of preparing ballots, voters would be at liberty to choose such appropriate forms, materials and methods as seemed to them most desirable. The word itself originally signified a little ball used in voting,<sup>1</sup> but by common acceptance in modern political elections it has come to mean a piece of paper upon which is written or printed the names of the persons voted for with the title of the respective offices for which they are to be chosen.<sup>2</sup>

Even as thus construed, there is, unless otherwise provided by law, no objection to the voter's choosing for himself the size and style of his ballot, nor need it consist of one piece of paper only, but, if intended in good faith, the voter may select separate pieces for various offices.<sup>3</sup>

The method of voting by ballot, and the word ballot itself so signifies when used in that sense, is the personal deposit by the voter of his ballot in a box or other receptacle provided for that purpose and confided to the charge of the officers of the election.<sup>4</sup>

§ 192. **Ballot implies Secrecy.**—"The distinguishing feature of this mode of voting," says Judge COOLEY, "is that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy in regard to the persons for whom he

<sup>1</sup> See Webster's Dictionary, Bouvier's Law Dictionary, title "Ballot."

<sup>2</sup> "A ballot may be defined to be a piece of paper or other suitable material, with the name written or printed upon it of the person to be voted for." Cushing Leg. Assem.

§ 108; Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97.

<sup>3</sup> Wildman v. Anderson, 17 Kan. 344.

<sup>4</sup> Cushing's Leg. Assem. § 108; Bouvier's Law Dictionary, title "Ballot;" Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97.

votes, and thus escape the influences which, under the system of oral suffrages, may be brought to bear upon him with a view to overbear and intimidate, and thus prevent the real expression of public sentiment.”<sup>1</sup>

This element of secrecy has always been considered to be one of the most important and valuable safeguards of the independence of the voter and of the free and fair exercise of the right to participate in popular elections.<sup>2</sup> In many of the States, statutes have been passed designed to declare and protect it, and reference will be made to these in the following section, but even in the absence of such provisions, it has been held that the right to vote by ballot, as conferred and practiced in the United States, of itself implies absolute and inviolable secrecy, and that the principle is founded in the highest considerations of public policy.<sup>3</sup>

§ 193. **Statutes protecting the Secrecy of the Ballot.**—As stated in the last section, statutes have been enacted in several of the States designed to protect the secrecy of the ballot. These statutes usually forbid the use of other than white paper for the ballots, and the printing or impressing upon the ballots of any device, mark, figure or other sign by which one ballot or ticket may be distinguished from another.

These provisions, however, like others already considered, are intended to regulate and protect the right to vote, and not to impair or impede it, and they will not be extended by a restricted interpretation beyond the reason and purpose of their enactment.<sup>4</sup>

Thus where the statute required ballots to be written or printed on white paper, it was held that ballots should not be rejected because printed on paper having a “bluish ground tinge” placed there by the manufacturer, and not used for the purpose of distinguishing one ballot from another.<sup>5</sup> So where the statute

<sup>1</sup> Cooley’s Constitutional Limitations, 760.

<sup>2</sup> See opinion of DENIO, C. J. in *People v. Pease*, 27 N. Y. 45.

<sup>3</sup> *Williams v. Stein*, 38 Ind. 89, 10 Am. Rep. 97; *Temple v. Mead*, 4 Vt. 535; *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141.

<sup>4</sup> See *State v. Phillips*, 63 Tex. 390, 51 Am. Rep. 646; *State v. Watson*, 9 Mo. App. 593; *Kirk v. Rhoads*, 46 Cal. 898; *Drullner v. State*, 29 Ind. 808; *Stanley v. Manly*, 85 Ind. 275.

<sup>5</sup> *People v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769.

provided that all ballots should "be printed on plain white paper, without any distinguishing marks or other embellishment thereon except the names of candidates and the offices to be voted for," and that "the inspectors of election shall refuse all ballots offered of any other description," it was held that a ballot might properly have a printed heading, as "Republican ticket" on the same side as the names, and folded inside, these not being "distinguishing marks or embellishments" within the meaning of the statute;<sup>1</sup> and where the statute permitted captions or headings not designed to mislead, it was held that ballots having the heading "Independent" or "Greenback-Labor" were not objectionable;<sup>2</sup> nor are such headings "devices."<sup>3</sup>

So when the statute provided that "all ballots shall be written or printed on plain white paper, without any picture, sign, vignette, device, stamp or mark," except the names, etc., it was held that a diamond-shaped ballot is not a "device" within the prohibition of this statute;<sup>4</sup> nor is a discoloration caused by scratching names from the ballot and substituting others with a pen and ink a "distinguishing mark" within the meaning of a statute forbidding them;<sup>5</sup> nor are "stickers" or "pasters" containing the name of a candidate a "cut or device to distinguish one ballot from another."<sup>6</sup>

But where the statute requires that ballots shall be printed upon paper of a certain size, smaller ballots are to be rejected,<sup>7</sup> and so are those printed upon colored paper where the law forbids its use.<sup>8</sup>

So where the statute required ballots to be printed upon white paper "without any device or mark by which one ticket may be known or distinguished from another," printers' rules or dashes printed beneath the names are such devices or marks as are sufficient to warrant the rejection of the ballots.<sup>9</sup>

So under a by-law forbidding "other things" on the ticket than

<sup>1</sup> *Drulliner v. State*, 29 Ind. 308;  
*Millholland v. Bryant*, 89 Ind. 363.

<sup>2</sup> *Shields v. McGregor*, 91 Mo. 534.

<sup>3</sup> *Williams v. State*, 69 Tex. 368, 6  
S. W. Rep. 845,

<sup>4</sup> *State v. Phillips*, 63 Tex. 390, 51  
Am. Rep. 646.

<sup>5</sup> *Wyman v. Lemon*, 51 Cal. 273.

<sup>6</sup> *Quinn v. Markoe*, 37 Minn. 439,  
35 N. W. Rep. 263.

<sup>7</sup> *Reynolds v. Snow*, 67 Cal. 497.

<sup>8</sup> *State v. McKinnon*, 8 Oreg. 493.

<sup>9</sup> *Oglesby v. Sigman*, 58 Miss. 502;  
*Steele v. Calhoun*, 61 Miss. 556.

the names, the figure of an eagle with the motto "*E pluribus unum*," used as a mark to distinguish the tickets of one party, will invalidate the ballot.<sup>1</sup>

The presiding officers of the election have been held to be the sole judges of what constitutes a "distinguishing mark" where such a mark is prohibited, and ballots which they have received and counted, cannot afterwards be rejected by the governor and council.<sup>2</sup>

§ 194. **Statute requiring distinctive Marks is unconstitutional.**—And so zealously do the courts guard the secrecy of the ballot, that it has been held that a statute requiring a distinctive mark to be placed upon each ballot, is unconstitutional and void. Thus where a statute provided that the inspectors of election, on receiving a ballot should number it on the outside to correspond with the voter's number on the poll list, it was held that the constitutional right to vote by ballot necessarily meant a secret ballot and that the act in question was "in palpable conflict not only with the spirit but with the substance of the constitutional provision," and hence was void.<sup>3</sup>

In some of the States, however, such a marking is required by the constitution.<sup>4</sup>

§ 195 **"Written" Ballot includes printed one.**—Where the constitution required all ballots to be "fairly written," it was held that the spirit of this provision justified the use of printed ballots.<sup>5</sup>

§ 196. **Ballot must contain but one Name for each Office.**—It is obvious that where the number of persons to be elected to each office is limited, as to one incumbent to each office, a ballot containing more names than the number limited must be inoperative as to the office named. The very purpose of the voting is that the voter may exercise his choice, and where he names more than the limited number it is impossible to

<sup>1</sup> Commonwealth v. Woelper, 8 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

<sup>2</sup> Opinions of Judges, 45 Me. 602.

<sup>3</sup> Williams v. Stein, 28 Ind. 89, 10 Am. Rep. 97; See also Brisbin v. Cleary, 26 Minn. 107.

<sup>4</sup> Pennsylvania Cons. 1873, Art. 8, Sec. 4; Missouri, 1875, Art. 8, Sec. 8; Colorado, 1876, Art. 7, Sec. 8.

<sup>5</sup> Temple v. Mead, 4 Vt. 535; Henshaw v. Foster, 9 Pick. (Mass.) 312.

determine which of the number shall be declared elected. And as it is the *voter's* choice which is to be determined, the inspectors of election can not undertake to decide which of the number he intended. There is, therefore, no choice for that office.<sup>1</sup>

But uncertainty of this nature as to one of several offices to be filled, will not invalidate the ticket as to other offices upon it the choice for which is clear.<sup>2</sup>

So if the name of the same candidate is given more than once for the same office, it is to be counted once and not rejected entirely.<sup>3</sup>

§ 197. *Same Subject—Written Evidence supersedes printed.*—So upon the principle that, where written and printed words in the same instrument are in conflict, the special written words shall prevail over the general printed ones, it is held that where the voter writes a name upon the ballot in connection with a certain office, this is a sufficient indication of an intention to vote for the person whose name is so written, although the voter neglects to erase the name printed in connection with the same office.<sup>4</sup> But it is held that the writing prevails only when shown to have been done by the voter himself.<sup>5</sup>

§ 198. *Same Subject—Effect to be given to "Slip" or "Paster."*—But the same effect has been denied to a "slip" or "paster." Thus in the leading case<sup>6</sup> upon the subject, CAMPBELL, J., says: "I think that unless a person has so pasted on his slip as to show beyond question for whom his vote is cast for a particular office, it cannot be counted. Where it is so placed as to show upon the face of the ballot two distinct names for the same office, it comes, I think, within the express provision of the statute<sup>7</sup> concerning double votes, which can seldom be given except by this mode.

<sup>1</sup> *People v. Loomis*, 8 Wend. (N. Y.) 896, 24 Am. Dec. 83; *People v. Seaman*, 5 Den. (N. Y.) 409. See especially *Kreitz v. Behrensmeyer*; 125 Ill. 141, 8 Am. St. Rep. 849.

<sup>2</sup> *Attorney-General v. Ely*, 4 Wis. 430; *Perkins v. Carraway*, 59 Miss. 223. *Contra*, under statute, *Deloatch v. Rogers*, 86 N. C. 857.

<sup>3</sup> *People v. Holden*, 28 Cal. 123; *State v. Pierce*, 35 Wis. 98.

<sup>4</sup> *People v. Saxton*, 22 N. Y. 309, 78 Am. Dec. 191; *Contra*, *Newton v. Newell*, 26 Minn. 529. See *State v. Griffey*, 5 Neb. 161.

<sup>5</sup> *Kreitz v. Behrensmeyer*, 125 Ill. 141, 17 N. E. Rep. 232, 8 Am. St. Rep. 849.

<sup>6</sup> *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141.

<sup>7</sup> The statute referred to is as follows:

But if the name is placed above the name of another candidate for the same office, so as to partially obliterate it, I think that would be sufficient to show an intent to vote against the one and for the other."<sup>1</sup>

§ 199. **Names must be clearly expressed.**—The names of the persons intended to be voted for should be clearly and plainly expressed. If part of the name only be given, or if it be so defectively written or printed as to be illegible, it can not be counted.<sup>2</sup>

But errors in spelling will not vitiate the ballot if the sound be the same;<sup>3</sup> nor will the omission of a middle letter,<sup>4</sup> or of a suffix or addition to the name,<sup>5</sup> or the giving of a wrong middle letter,<sup>6</sup> there being no other candidate to whom the name as given would properly apply; nor will the use of well known and commonly adopted abbreviations of the first name;<sup>7</sup> nor, in some cases, the total omission of the first name.<sup>8</sup>

"The ballot shall be a paper ticket, which shall contain, written or printed, or partly written and partly printed, the names of all the persons for whom the elector intends to vote, and shall designate the office to which each person so named is intended to be chosen; but no ballot shall contain a greater number of names of persons, *as designated to any office*, than there are persons to be chosen at the election to fill such office."

<sup>1</sup> The decision in this point is followed in *Keeler v. Robertson*, 27 Mich. 116.

<sup>2</sup> *People v. Cicott*, 16 Mich. 288, 97 Am. Dec. 141.

<sup>3</sup> Thus votes for "Finegan" and "Finnigan" are properly counted for "Finnegan." *People v. Mayworm*, 5 Mich. 146. "Kritz," "Krietz" and "Critz" are properly counted for "Kreitz." *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. Rep. 232.

<sup>4</sup> Thus votes for "John Jochim" were held to be properly counted for

"John W. Jochim" where the latter was the candidate, and there was no offer to show that there was another person by the name of John Jochim in the district. *People v. Kennedy*, 37 Mich. 67.

<sup>5</sup> *People v. Cook*, 14 Barb. (N. Y.) 259, s. c. 8 N. Y. 67, 59 Am. Dec. 451, where it was found that ballots given for Benjamin Welch were intended for Benjamin Welch, Jr., and it was held that they should be counted for him.

<sup>6</sup> Thus votes cast for Alvin J. Willoughby will be counted for Alvin L. Willoughby, where such was the intention of the voters. *State v. Gates*, 48 Conn. 533. But see *Opinion of Judges*, 38 Me. 597.

<sup>7</sup> Thus "Geo." will be counted to George, "Jas." to James, "Thos." to Thomas, and the like. *People v. Tisdale*, 1 Dougl. (Mich.) 59.

<sup>8</sup> Thus where Joseph Talkington was the candidate, votes were held properly counted for him which read simply "Talkington." *Talkington v.*

So, by the weight of authority, a ballot *which contains only the initials of the Christian or first name of the candidate is sufficient, where there are not two candidates of the same name and initials for the same office.*<sup>1</sup>

Turner, 71 Ill. 234. So votes for "Behrensmeyer" were counted for Charles F. A. Behrensmeyer, where no other Behrensmeyer was a candidate. Kreitz v. Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349.

In Newton v. Newell, 26 Minn. 530, the court, by BERRY, J. say: "With reference to the name by which a candidate may be sufficiently designated, we regard the following rules to be correct: If, for a certain office, there is but one person running of a given name, say the name of Frank E. Newell, a ballot for "Newell" simply, without any Christian name or initial thereof, will pass, and should be counted for Frank E. Newell; and so should a ballot for Frank Newell, or F. E. Newell, or F. Newell. So, if to designate, the person voted for, letters are used which do not spell the name 'Newell,' but do spell a word which is *idem sonans*, this should be counted. All these should be counted, for the reason that they designate the person intended to be voted for with reasonable certainty.

But unless the ballot is of one of these kinds, or of equivalent certainty, (as it possibly may be, though we do not now perceive how) it should be rejected. Therefore a ballot for 'Nall,' or 'Null,' or 'Neden,' or 'W. Null' should not be counted for Newell. Neither should a ballot for 'New,' or 'Newt,' or 'Newto,' or 'Newn,' or 'Neto,' be counted for a candidate of the name of Newton. 'Nuton' and 'Newton' may, however, be properly counted for such candidate."

In Missouri, however, where Caleb Gumm and Joel D. Hubbard were the candidates and most of the voters were Germans, ballots for "J. D. Huba," "J. D. Hubba," "Huber" and "J. D. Hub" were counted for Hubbard. Gumm v. Hubbard, — Mo. — 11 S. W. Rep 61.

<sup>1</sup>The case which has probably gone the farthest in this direction among the early cases, is Attorney-General v. Ely, 4 Wis. 420, where votes cast for "D. M. Carpenter," "M. D. Carpenter," "M. T. Carpenter" and "Carpenter" were allowed to be counted for Matthew H. Carpenter, the jury having found, from the evidence before them, that these votes were, when cast, intended to be for him.

In People v. Ferguson, 8 Cow. (N. Y.) 102, ballots cast for H. F. Yates were held properly be counted for Henry F. Yates, if the jury were of the opinion that they were intended for him. This ruling was followed in People v. Seaman, 5 Den. (N. Y.) 409 and People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451. See also in McKenzie v. Braxton, 42d Congress; Chapman v. Ferguson, 1 Bart. 267; Gunter v. Willshire, 43d Congress. See also Clark v. Robinson, 88 Ill. 498; Talkington v. Turner, 71 Ill. 234; State v. Gates, 48 Conn. 538; Wimmer v. Eaton, 72 Iowa, 374, 2 Am. St. Rep. 250; State v. Williams, 95 Mo. 159, 8 S. W. Rep 415.

Early cases in Michigan were to the contrary: People v. Tisdale, 1 Dougl. 59; People v. Higgins, 8 Mich, 283, 61 Am. Dec. 491, but in a subsequent case the majority of the court expressed the opinion that they



But where the name used is altogether different, or is not *idem sonans*, and is not a mere abbreviation, the ballot cannot be counted.<sup>1</sup>

§ 200. *Slight Irregularities do not vitiate.*—Slight irregularities in the ballot which deceive no one can not vitiate it. If the ballot expresses the intention of the voter with reasonable certainty, it is sufficient, and should be counted.<sup>2</sup>

Thus the omission of the word “for” before the name of the office, is a harmless error.<sup>3</sup> And the fact that the ballot reads “to fill vacancy” where, though a vacancy had existed, it was already filled by temporary appointment;<sup>4</sup> or for “police justice,” when it should have been for “police magistrate;”<sup>5</sup> or for trustees of *public* schools when trustees of *common* schools were being elected;<sup>6</sup> or for “superior judge” when it should have been for “judge of the superior court;”<sup>7</sup> or for “circuit clerk” instead of for “clerk of the circuit court;”<sup>8</sup> or “for congress” instead of “for representative in congress,”<sup>9</sup> can deceive no one and the irregularity should be disregarded. So mistakes in the number of the district, where no one is misled, are harmless.<sup>10</sup>

§ 201. *But Ballot must be reasonably certain.*—But at the

were unsound in principle, though they were adhered to on the ground of *stare decisis*. *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141. See also *People v. McNeal*, 68 Mich. 294. See also Opinion of Judges, 64 Ma. 596, where it is held that where votes have been returned to the Secretary of State as cast for William H. Smith, W. H. Smith and W. Smith, the governor and council cannot count them all for William H. Smith. See also *Clark v. County Examiners*, 126 Mass. 282, where it was held that votes cast for “L. Clark” could not be counted by the canvassers for Leonard Clark, though it was intimated that on a trial evidence might be adduced to show that they were intended for him.

<sup>1</sup> *People v. Cicott*, 16 Mich. 283, 97

Am. Dec. 141; *State v. Judge*, 13 Ala. 805.

<sup>2</sup> *Clark v. Commissioners*, 38 Kans. 202, 52 Am. Rep. 526; *Hawes v. Miller*, 56 Iowa, 395; *State v. Elwood*, 12 Wis. 551; *Detroit, &c. R. R. Co. v. Bearss*, 89 Ind. 598; *State v. Metzger*, 26 Kans. 395; *Cattell v. Lowry*, 45 Iowa, 478; *Holland v. Davis*, 36 Ark. 446; *Peck v. Weddell*, 17 Ohio St. 271; *Brown v. McCollom*, 76 Iowa 479, 41 N. W. Rep. 197.

<sup>3</sup> *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141.

<sup>4</sup> *State v. Mechem*, 31 Kans. 435.

<sup>5</sup> *People v. Matteson*, 17 Ill. 167.

<sup>6</sup> *People v. McManus*, 34 Barb. (N. Y.) 620.

<sup>7</sup> *Coffey v. Edmonds*, 58 Cal. 531.

<sup>8</sup> *Applegate v. Eagan*, 74 Mo. 253.

<sup>9</sup> *State v. Berg*, 76 Mo. 136.

<sup>10</sup> *Ingils v. Shepherd*, 67 Cal. 469.

same time the ballot must indicate the person and the office with reasonable certainty, or it can not be counted.<sup>1</sup> Thus if there are two offices to be filled and the ballot does not indicate for which the persons named are chosen, or if officers are to be elected for different terms and the ballot does not show for which term the officer is chosen, it must be rejected.<sup>2</sup>

So where a legislative act authorizes the submission of a certain question to the electors, without prescribing the form of the ballot to be used, it is necessary in order to render the vote operative, that the ballot of the voter should show that the specific question contemplated by the act was passed upon.<sup>3</sup>

§ 202. Perfect Ballot is conclusive Evidence of Voters Intent. — Where the ballot is perfect, containing neither uncertainties, ambiguities nor imperfections, it must be accepted as conclusive evidence of the voter's intention, and evidence *aliunde* can not be received to give the ballot a meaning or effect different from that which appears upon its face.<sup>4</sup> The ballot may be void,

<sup>1</sup> Although a candidate's name is *written* above the name of the office on the ballot, it will be construed as a vote for him where the *printed* name below the name of the office is erased. So votes are held to have been intended for different offices, rather than as two votes for one office, where ballot contains the name of an office and a candidate's name *printed* below it, and below that another name *written* in, followed by the name of another office, the candidate's name under the latter office being erased. But where the *printed* name under the designation of the office is stricken out, and the name of one of the candidates for that office is *written* in below the name of another officer and below the printed name of the candidate for that office, evidence is not admissible to show for what office the name so written in was intended. *Kreitz v. Behrens-meyer*, 125 Ill. 141, 8 Am. St. Rep. 849.

<sup>2</sup> *Milligan's Appeal*, 96 Penn. 222; *In re Gilleland*, 96 Penn. 224. But

voter's intention may be shown to explain. *Phelps v. Goldthwaite*, 16 Wis. 146.

<sup>3</sup> *People v. Township Board*, 14 Mich. 28.

<sup>4</sup> *Wimmer v. Eaton*, 72 Iowa 374, 2 Am. St. Rep. 250. In the case it is said: "If the ballot is found to be perfect, that is, if it expresses a certain intent by the elector, it must be accepted as the exclusive evidence of his intent. Thus if it bears the name of a person who is eligible to the office voted for, it affords the most satisfactory evidence that it was the elector's intention to vote for that person; and it would be contrary to all the analogies of the law to permit proof by extrinsic evidence of a contrary intent." See also *People v. Seaman*, 5 Denio (N. Y.) 409.

So where a ballot was printed for Samuel *Toley*, evidence is inadmissible that it was intended for Samuel *Tobey*. *People v. McNeal*, 63 Mich. 294. See also *Anderson v. Winfree*, — Ky. —, 4 S. W. Rep. 351.

but if it is not ambiguous it can not be aided by extrinsic proof.<sup>1</sup>

§ 203. **Extrinsic Evidence to explain Ballot.**—The question of the admissibility of extrinsic evidence to explain imperfections, uncertainties and ambiguities in the ballot, is one upon which the authorities are not entirely in harmony, but it is believed that the weight of authority sustains the rule given by Judge COOLEY in his treatise on Constitutional Limitations.\*

"We think evidence of such facts as may be called the circumstances surrounding the election,—such as who were the candidates brought forward by the nominating conventions; whether other persons of the same names resided in the district from which the officer was to be chosen, and, if so, whether they were eligible or had been named for the office; if a ballot was printed imperfectly, how it came to be so printed, and the like,—is admissible for the purpose of showing that an imperfect ballot was intended for a particular candidate, unless the name is so dif-

<sup>1</sup> See *McKinnon v. People*, 110 Ill. 305. Here votes cast for Joseph M. were counted for Henry M. on a showing that the tickets were so printed by mistake, and that voters supposed that Henry was named Joseph, there being no such candidate as Joseph M., and no such person in the election district.

In *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349, it is said: "Manifestly it would not be competent to hear the voter say that he intended a ballot plainly for a particular name, for one having no such similarity of sound as that one might reasonably be intended for the other; and it is quite as obvious that it is competent to prove, by the elector, what he understood the names of the candidates to be and how he reads his ballot. If he has used the letters of a foreign language to express the name, it is competent to prove, by the voter, or by some one else versed in that language, what word or words

they make. If the characters are so complex in their formation, or so imperfectly framed, or so obscurely impressed, as to make it difficult to read them, it is competent to prove, by any one understanding them, what they are. What is not admissible is to show that something was intended which is plainly contradictory of what was done—as for instance, that a ballot cast with the name of Jones for a particular office upon it was intended to be a vote for Smith for the same office. And so, upon like principle, where it is shown that there has been what appears to be an erasure of a name, it may be shown that it was not done by the voter, or that it was the result of an accident, and not of intention; but the fact of erasure being conceded to have been the deliberate act of the voter, it cannot be explained that by it he intended a different result from that which the law implies from it."

\* 5th ed. p. 768.

ferent that to thus apply it would be to contradict the ballot itself; or unless the ballot is so defective that it fails to show any intention whatever; in which cases it is not admissible.

And we also think that in any case to allow a voter to testify by way of explanation of a ballot otherwise fatally defective, that he voted the particular ballot, and intended it for a particular candidate, is exceedingly dangerous, invites corruption and fraud, and ought not to be suffered. Nothing is more easy than for reckless parties thus to testify to their intentions, without the possibility of their testimony being disproved if untrue; and if one falsely swears to having deposited a particular ballot, unless the party really depositing it sees fit to disclose his knowledge, the evidence must pass unchallenged; and the temptation to subornation of perjury, when public offices are at stake, and when it may be committed with impunity, is too great to allow such evidence to be sanctioned. While the law should seek to give effect to the intention of the voter, whenever it can be fairly ascertained, yet this intention must be that which is expressed in due form of law, not that which remains hidden in the elector's breast; and where the ballot, in connection with such facts surrounding the election as would be provable if it were a case of contract, does not enable the proper officers to apply it to one of the candidates, policy, coinciding in this particular with the general rule of law as applicable to other transactions, requires that the ballot shall not be counted for such candidate."<sup>1</sup>

1 "When it is apparent," say the court by REED, J., in a recent Iowa case, "that the intent of the elector is imperfectly expressed by the ballot, as when the person intended to be voted for is not certainly identified by it, the true rule is, we think, to admit extrinsic evidence in aid of such imperfection. It often happens that the elector is ignorant or mistaken as to the Christian name of the person for whom he wishes to cast his ballot. In such cases the Christian name is either omitted entirely from the ballot, or wrongly written thereon. Now, if no evidence except the ballot could be resorted to in such

cases in determining the intent of the election, it is manifest that the privilege of the elective franchise would be defeated by the rule. But the right to vote is one of the highest privileges of the citizen, and it ought not to be defeated by a technicality. Hence the courts have quite generally held that resort might be had in such cases to the circumstances surrounding the election, and the facts of a general public nature connected with it, and that these might be considered, in connection with the ballot, in determining what was the intention of the elector. The question is elaborately discussed in Attorney-Gen-

7. *What constitutes an Election.*

§ 204. **Plurality of Votes sufficient for a Choice.**—In the absence of a constitutional or statutory provision expressly requiring more, a plurality of the votes lawfully cast is sufficient to elect.<sup>1</sup> In one or two States a majority of the votes is expressly required, but to require more than a plurality in the ordinary election where there are usually several candidates for every office would be to make the election in the majority of cases impossible.

Where several are to be chosen to the same office, the requisite number standing highest on the list will be elected.<sup>2</sup>

§ 205. **Not necessary that a Majority of Voters should vote.**—And it is not necessary that a majority of the whole body of voters in the district should have participated in the election. Even though a minority only participate, yet, if the election be lawfully held, a plurality of the minority will elect.<sup>3</sup> Those of the voters who remain away from the polls are assumed to assent to the action of those who do attend, and those who do attend the election but fail to vote for any office are presumed to assent to the action of those who do vote.<sup>4</sup>

So where a question has been expressly referred to the decision of the "majority of the voters" of a county, a majority of the votes polled will determine it.<sup>5</sup>

ral v. Ely, 4 Wis. 438, and what we think is the true rule is there laid down." Wimmer v. Eaton, 72 Iowa, 374, 2 Am. St. Rep. 250. See also Phelps v. Goldthwaite, 16 Wis. 146; People v. McNeal, 63 Mich. 294; Kreitz v. Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349.

<sup>1</sup> "He who receives the highest number of earnest valid ballots is the one chosen to the office," FOLGER, J., in People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508.

<sup>2</sup> Cooley's Const. Lim. 779.

<sup>3</sup> People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508; Augustin v. Eggleston, 12 La. Ann. 366; Gillespie v.

Palmer, 20 Wis. 544; Oldknow v. Wainwright, 1 W. Bl. 229; Rex v. Foxcroft, 2 Burr. 1017.

<sup>4</sup> People v. Clute, 50 N. Y. 451; 10 Am. Rep. 508; Louisville & C. R. R. Co. v. County Court, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; County of Cass v. Johnston, 95 U. S. 360; Taylor v. Taylor, 10 Minn. 107; People v. Warfield, 20 Ill. 159; People v. Garner, 47 Ill. 246; People v. Wiant, 48 Ill. 263; State v. Swift, 69 Ind. 531.

<sup>5</sup> Louisville & C. R. R. Co. v. County Court, 1 Sneed. (Tenn.) 637, 62 Am. Dec. 424; Walker v. Oswald, — Md. —, 11 Atl. Rep. 711; St Joseph Township v. Rogers, 16 Wall. (U. S.)

So where a special question was to be submitted at a general election and was to be held approved if "two-thirds of the votes cast" were in favor of it, it was held that the approval required a number of votes equal to two-thirds of all the votes cast upon any one question, or for all of the candidates for any one office, voted for at that election.<sup>1</sup>

This, however, assumes that notice of the election, when required, has been duly given,<sup>2</sup> but if given, or if none was required, the fact that the majority of the electors paid no attention to the notice or failed to observe the law requiring the election to be held, will not defeat the choice of those who do participate.<sup>3</sup>

§ 206. **Effect of Ineligibility of Candidate receiving Majority of Votes.**—The question has been much discussed whether if the person receiving the highest number of votes were ineligible to the office, the person who receives the next highest number of votes, is, if eligible, to be deemed to be elected, or whether the election has failed and no one is chosen.

The English rule is, that if the ineligibility of the candidate receiving the highest number of votes was known to the voters, or if the fact were so notorious that they must be presumed to have known of it, the votes cast for him must be regarded as of no avail and are not to be counted, and hence the eligible candidate having the next highest number of votes must be deemed to be elected.<sup>4</sup>

But the English rule, though adopted in Indiana,<sup>5</sup> has had but

644; *County of Cass v. Johnston*, 95 U. S. 360; *Everett v. Smith*, 22 Minn. 58.

*Contra*, *State v. Francis*, 95 Mo. 44, 8 S. W. Rep. 1; *State v. Sutterfield*, 54 Mo. 392; *State v. Brassfield*, 67 Mo. 831; *State v. Mayor*, 73 Mo. 435.

See also *Rigsbee v. Durham*, 99 N. C. 341, 8 S. E. Rep. 749.

<sup>1</sup> *State v. Anderson*. — Neb. —, 42 N. W. Rep. 421.

<sup>2</sup> See *State v. Good*, 41 N. J. 296, where the people being in doubt as to whether a vacancy existed and only a very few voting, it was held that

there was no election; and *Secord v. Foutch*, 44 Mich. 89, where no notice being given and only a few voting, it was held there was no election.

<sup>3</sup> *People v. Hartwell*, 12 Mich. 508, 86 Am. Dec. 70.

<sup>4</sup> *Rex v. Hawkins*, 10 East 211; *Rex v. Parry*, 14 East 549; *Gosling v. Veley*, 7 Q. B. 406; *Rex v. Monday*, 2 Cowp. 530; *Rex v. Foxcroft*, 2 Burr. 1017; *Regina v. Coaks*, 8 E. & B. 249; *French v. Nolan*, 20 Wk. Rep. 833, 2 Eng. Rep. (Moak) 711.

<sup>5</sup> *Gulick v. New*, 14 Ind. 98, 77 Am. Dec. 49; *Carson v. McPhet-*

little following elsewhere in the United States, and the doctrine here supported by an undoubted preponderance of authority is that though the candidate receiving the highest number of votes may, because of his ineligibility, fail of election, yet the votes cast for him are so far effectual as to prevent the election of other candidates, and there is no election at all.<sup>1</sup>

ridge, 15 Ind. 327; *Price v. Baker*, 41 Ind. 572, 18 Am. Rep. 246.

In the case last cited it is said by DOWNNEY, J.:

"It is a principle of law well settled in this State, that where a majority of the ballots at an election are given to a candidate who is not eligible to the office, the ballots so cast are not to be counted for any purpose. They cannot be counted to elect the ineligible candidate or to defeat the election of an opposing candidate by showing that he did not receive a majority of the votes cast at such election. They are regarded as illegal, and as having no effect upon the election for any purpose. As a consequence, it follows that the candidate who is eligible, having the highest number of legal votes, though the number may be less than the number of votes cast for the ineligible candidate, and less than a majority of all the votes cast at such election, is entitled to the office. *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49.

But the rule is applicable to those cases only where different persons are candidates for the same office, and it has no application to cases where two or more persons are candidates at the same election for different offices. To apply the rule in such a case would be to put a party into office for whom, as a candidate for that office, none of the electors had voted."

<sup>1</sup> *State v. Giles*, 1 Chand. (Wis.)

112, 52 Am. Dec. 149; *State v. Smith*, 14 Wis. 497; *State v. Tierney*, 23 Wis. 480; *Saunders v. Haynes*, 13 Cal. 145; *Fish v. Collens*, 31 La. Ann. 289; *State v. Gastinel*, 20 La. Ann. 114; *State v. Vail*, 58 Mo. 97; *State v. Boal*, 46 Mo. 528; *Sublett v. Bedwell*, 47 Miss. 266, 12 Am. Rep. 338; *State v. Swearingen*, 12 Ga. 24; *Commonwealth v. Cluley*, 56 Penn. 270, 94 Am. Dec. 75; *Opinion of Judges*, 38 Me. 97; *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538. *Barnum v. Gilpin*, 27 Minn. 466, 38 Am. Rep. 304; *Crawford v. Dunbar*, 53 Cal. 86; *Dryden v. Swinburne*, 20 W. Va. 89.

Even the death of the candidate receiving the highest vote, a few hours before the opening of the polls, does not elect the next highest candidate, although the voters and judges of election knew of the death. *State v. Walsh*, 7 Mo. App. 142.

In *People v. Molitor*, 23 Mich. 341, it appeared that the statute provides that "the persons having received the greatest number of votes given for any office, at such election, shall be deemed and declared duly elected." Said CAMPBELL, O. J.: "It does not, under any circumstances, allow a minority candidate to be deemed elected,—whether the person for whom the majority appear to have voted, can or cannot be installed. The majority here are alleged by the plea to have voted for some one whom they designated as 'L. O. Crawford.' Whether there is in fact a person of that name or not

In a leading case in New York it was held that the knowledge, on the part of the voters, of the ineligibility of the leading candidate might be such as to indicate an intention on their part to throw away their votes,<sup>1</sup> but there must be actual knowledge

does not change the state of the canvass, nor make sixty-nine a larger number than seventy-two."

<sup>1</sup> People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508. In this case FOLGER, J., says: "There may be a disqualifying fact so patent or notorious, as that knowledge in the elector of the ineligibility may be presumed as matter of law. In modern times Lord DENMAN, C. J., thus puts a case: 'No one can doubt that if an elector would nominate and vote only for a woman to fill the office of mayor, or burgess in parliament, his vote would be thrown away; there the fact would be notorious, and every man would be presumed to know the law upon that fact.' Gosling v. Veley, 7 Ad. & Ell. N. R. 406, 439, 58 Eng. Com. Law 406. In the same case, the learned judge says that 'the result of the decisions appears to be this; where a majority of the electors vote for a disqualified person, in ignorance of the fact of disqualification, the election may be void or voidable, or, in the latter case, be capable of being made good, according to the nature of the disqualification. The objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available; or it may be such as to place the elected candidate on the same footing as if he never had existed, and the votes for him were a nullity.' And then, referring doubtless to the *ex vivo* manner of voting in England, and to the manner of keeping of poll books there, and to the fact of the number of electors there being small, so that for whom

each elector has voted is known, and he may be safely allowed to recall his vote for an ineligible person, and give it for another eligible, the learned Judge continues: 'But in no such case, are the electors who vote for him deprived of their vote if the fact becomes known, and is declared while the election is still incomplete. They may instantly proceed to another nomination and vote for another candidate. If it be disclosed afterward, the party elected may be ousted and the election declared void; but the candidate in the minority will not be deemed *ipso facto* elected. But where an elector, before voting, receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchises.' To which we add, that not only must the fact which disqualifies be known, but also the rule or enactment of law which makes the fact thus effectual.

In the multitude of cases in which the question has arisen, we think that up to this point there is no essential difference of result. All agree that there must be prior notice to or knowledge in the elector of fact and law to make his vote so ineffectual as that it is thrown away. But some say that if there be a public law, declaratory that the existence of a certain fact creates ineligibility in the candidate, the elector, having notice of that fact is conclusively presumed in law to have knowledge of the legal rule, and to be deemed to have voted in persistent disregard of it. Others



both of the fact and the law. Says the court, per FOLGER, J., "the existence of the fact which disqualifies, and of the law

deny that the maxim '*Ignorantia juris excuset neminem*' even with the clause of it '*quod quisque scire tenetur*,' not often quoted, can be carried to that length, and insist that there does not apply to this question the rule that all citizens must be held to know the general laws of the land, and the special law affecting their own locality.

That maxim, in its proper application, goes to the length of denying to the offender against the criminal law a justification in his ignorance thereof; or to one liable for a breach of contract, or for civil tort, the excuse that he did not know of the rule which fixes his liability. It finds its proper application when it says to the elector, who, ignorant of the law which disqualifies, has voted for a candidate ineligible, your ignorance will not excuse you and save your vote; the law must stand, and your vote in conflict with it must be lost to you. But it does not have a proper application when it is carried further, and charges upon the elector such a presumption of knowledge of fact and of law as finds him full of the intent to vote in the face of knowledge, and to so persist, in casting his vote for one for whom he knows it cannot be counted, as to manifest a purpose to waste it. The maxim itself concedes that there may be a lack of actual knowledge of the law. For it is *ignorance* of it which shall not excuse. Then the knowledge of the law, to which each one is held, is a theoretical knowledge; and the doctrine urged upon us would carry a theoretical knowledge of the statute further than goes the statute itself. The statute but makes

ineffectual to elect the votes given for one disqualified. The doctrine would make knowledge not actual, of that statute thus limited, waste the votes of the majority, and bring about the choice to office by the votes of a minority. We are not cited to nor do we find any decision to that extent of any court in this State. The industrious research of the learned counsel for the relator has found some from courts in sister States. *Gulick v. New* (14 Ind. 97, 77 Am. Dec. 49) is to that effect. *Carson v. McPhetridge* (15 Ind. 831), follows the last cited case. *Hatcheson v. Tilden* (4 Har. & McH. 279) was a case at *nisi prius*, and is to that effect. With respect for these authorities, we are obliged to say that they are not sustained by reasoning which draws with it our judgment. *Commonwealth v. Read* (2 Ashmead 261) is also cited. But that was a case of a board of twenty, assembling into a room to elect a county treasurer. On motion being made to elect *viva voce*, a protest was made that a law under which they were acting prescribed a vote by ballot. Thus *actual notice* of law and fact was brought directly to each elector before voting. Nineteen persisted in voting *viva voce*. These were held to be wasted votes. One voted by ballot, and his vote was held to prevail, and the person he voted for to be elected. *Commonwealth v. Cluley* (56 Penn. St. 270, 94 Am. Dec. 75) is also cited. But the language of the count there is: "The votes cast at an election for a person who is disqualified from holding an office are not nullities. They cannot be rejected by the inspectors or thrown out of the count by the re-

which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the

turn judges. The disqualified person is a person still, and every vote thrown for him is formal.' And that was the case of one who was ineligible by reason of having held the office of sheriff of a county, and became a candidate in the same county for the same office before the lapse of time prescribed by the constitution; a case in its facts quite like this in hand.

The relator also cites many instances of the action of legislative bodies and their committees. As to these, a respectable authority on these questions has remarked, 'that they cannot be said to afford any precise or useful principle,' (1 Peckwell 500); and learned counsel, arguing in support of the principle now claimed by the relator, has conceded that 'no fixed principle is established by the decision of committees.' (Galway Election Cases, 2 Moak Eng. Cases 714); and it may safely be said that they are not so conclusive and satisfactory as judicial determinations, as it is difficult to arrive at the exact principle upon which the votes of so many as constitute a legislative body are put. Besides that, they are not uniform, but quite diverse in their results, as appears from the citations of the counsel of the relator, and the instances noted in 56 Penn. St. *supra*.

We have consulted many of the authorities cited to us from the English books; and in them it will be found, we think, that where it was held that votes for an ineligible person would be treated as thrown away, it was not extended beyond cases in which there was actual notice of fact and law to the voters before their

votes were cast. *Gosling v. Veley, supra*; *Rex v. Hawkins*, 10 East 211; *Claridge v. Evelyn*, 5 Barn. & Ald. 81; *Douglass*, 898 n. (22); *Rex v. Parry*, 14 East 549; *Rex v. Bridge*, 1 Maule & Selw. 76.

And there are American authorities which hold that if a majority of those voting by mistake of law or fact happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him in poll shall receive the office. *Saunders v. Haynes*, 18 Cal. 145; *State v. Giles*, 1 Chand. (Wis.) 112, 52 Am. Dec. 149; *State v. Smith*, 14 Wis. 497. And in *Dillon on Mun. Corp.* p. 176, § 135, it is stated that unless the votes for an ineligible person are expressly declared to be void, the effect of such person receiving a majority of the votes cast is, according to the weight of American authority, and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be had, and not to give the office to the qualified person having the next highest number of votes. And this view is sustained by a preponderance of the authorities cited by the author in the foot note, some of which are cited above.

And in *the Queen v. Mayor, &c.*, 3 Law Rep. (Q. B.) 629 after holding that though the electors had actual notice of the fact which had been adjudged by the courts to disqualify, yet knowledge or notice in the elector of the adjudication could not be presumed. It is further said: 'It is not enough to show that the voter knew the fact only, but it is necessary to

elector, as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a willfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied."

### 8. *The Canvass and Returns.*

§ 207. *Canvassing the Vote.*—Upon the close of the election the inspectors of election are usually required to immediately make a public count or canvass of the votes cast. Where the election is a local one, the result of which is to be determined at a single precinct, they are also ordinarily required to make a public announcement of the result immediately upon the close of the canvass, and to give to the persons elected a certificate of that fact.

But where the election is a general one involving the choice, for example, of county, state and national officers, it is made the duty of the inspectors to certify or return in due form under their hands the total vote, at their respective precincts, for each of the offices to be filled and to file these certificates or returns with the proper officers for a general canvass to be had for the entire district, as for the county and state canvass.<sup>1</sup>

show sufficient to raise a reasonable inference that he knew that the fact amounted to a disqualification. It cannot be said in all cases that the mere knowledge of a fact, which in law disqualifies a candidate must be taken to be knowledge of all the accompanying circumstances."

<sup>1</sup> Supervising officers must be afforded a reasonable opportunity to perform their duties. *United States v. Clark*, 22 Fed. Rep. 887. Inspectors must perform their duties in person, and can not accept the statement of clerks or shield themselves by showing the errors of the clerks. *Bo-*

*land v. People*, 25 Hun (N. Y.) 423. Where the law requires each ballot to be separately read and announced, it is improper to read them in parcels, and a recount will be had. *O'Gorman v. Richter*, 81 Minn. 25. Fact that others than judges participated in the count will not invalidate if count was correctly made. *Roberts v. Calvert*, 98 N. C. 580, 4 S. E. Rep. 127; nor will the fact that the mechanical act of reading the ballots was performed by the clerks. *State v. Bernier*, — Minn. —, 88 N. W. Rep. 368.

§ 208. **Canvassers' Duties are ministerial merely.**—It is well settled that the duties of canvassing officers and boards are ministerial merely and not judicial. Their duty is to count the votes as cast, and they have no authority, unless expressly granted, to hear evidence or to pass upon or correct alleged errors, irregularities or frauds.<sup>1</sup>

§ 209. **Canvassing Boards bound by the Returns.**—And the canvassing boards are bound by the returns, when in due form, and cannot, unless expressly authorized by law, receive or regard anything outside of them, or reject them for other reasons than those appearing on their face.<sup>2</sup> Returns void upon their face may be rejected,<sup>3</sup> but if the returns be regular the duty of the canvassers "consists in a simple matter of arithmetic."<sup>4</sup>

And even matter appearing upon the face of the returns which is not, by law, required to be there, is *functus officio* and is to be disregarded.<sup>5</sup>

<sup>1</sup> *People v. Van Cleve*, 1 Mich. 362, 53 Am. Dec. 69; *People v. Cicott*, 16 Mich. 321, 97 Am. Dec. 141; *Morgan v. Quackenbush*, 23 Barb. (N. Y.) 72; *Dalton v. State*, 43 Ohio St. 652, 1 West. Rep. 778; Opinion of Judges, 58 N. H. 621; *State v. Steers*, 44 Mo. 223; *People v. Van Slyck*, 4 Cow. (N. Y.) 297; *Ex parte Heath*, 8 Hill (N. Y.) 47; *Dishon v. Smith*, 10 Iowa, 212; *State v. Cavers*, 22 Iowa, 843; *Attorney-General v. Barstow*, 4 Wis. 749; *State v. Rodman*, 43 Mo. 256; *State v. Harrison*, 38 Mo. 540; *Taylor v. Taylor*, 10 Minn. 107; *O'Ferrall v. Colby*, 2 Minn. 180; *Leigh v. State*, 60 Ala. 261; *State v. Wilson*, — Neb. —, 38 N. W. Rep. 81; *Maxwell v. Tolly*, 26 S. C. 77, 1 S. E. Rep. 160.

<sup>2</sup> *Ex parte Heath*, 8 Hill (N. Y.) 42; *Morgan v. Quackenbush*, 23 Barb. (N. Y.) 72; *People v. Cook*, 14 Barb. 259, 8 N. Y. 67, 59 Am. Dec. 451; *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *Prince v. Skillin*, 71 Me. 261, 36 Am. Rep. 325; *People v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769;

*People v. Jones*, 19 Ind. 357; *State v. Harrison*, 38 Mo. 540; *State v. Rodman*, 43 Mo. 256; *State v. Steers*, 44 Mo. 223; *Taylor v. Taylor*, 10 Minn. 107; *O'Ferrall v. Colby*, 2 Minn. 180; *Bacon v. York Co.* 26 Me. 491; Opinion of Judges, 64 Me. 596; *Peebles v. Commissioners*, 33 N. C. 385; *Clark v. County Examiners*, 126 Masa. 282; *State v. Canvassers*, 17 Fla. 29; *Moore v. Kessler*, 59 Ind. 152; *State v. Hayne*, 8 S. C. 367; *Phelps v. Schroder*, 26 Ohio St. 549; *Hagge v. State*, 10 Neb. 51; Opinion of Justices, 53 N. H. 640; *State v. Cavers*, 22 Iowa, 843; *People v. Hilliard*, 29 Ill. 413; *Brower v. O'Brien*, 2 Ind. 423; *State v. Hill*, 20 Neb. 119; *Lewis v. Commissioners*, 16 Kans. 102, 22 Am. Rep. 275.

<sup>3</sup> *State v. State Canvassers*, 36 Wis. 498; *Lawrence County v. Schmaulhausen*, 123 Ill. 321, 14 N. E. Rep. 255.

<sup>4</sup> *Morgan v. Quackenbush*, 23 Barb. (N. Y.) 72.

<sup>5</sup> *Ex parte Heath*, 8 Hill (N. Y.) 212; *Pennsylvania Dist. Election Case*,

So far has this doctrine been carried that it has been held that where the returns show votes distributed, for example to "William H. Smith," "W. H. Smith" and "W. Smith," the canvassing board cannot count them all for William H. Smith on the assumption that the voters intended to vote for him,<sup>1</sup> but the contrary has also been held,<sup>2</sup> and it would seem to be the true rule that the canvassers are at liberty to take notice of such facts of general notoriety as may aid them in arriving at the true intention, but matters requiring the aid of evidence *aliunde* must be reserved for the courts or other established tribunals.

§ 210. **Canvassers may be compelled to act by Mandamus.**—If the canvassers neglect or refuse, without sufficient reason, to meet and canvass the votes, they may be compelled to do so by mandamus,<sup>3</sup> and if they perform their duty in part only, or in any other illegal and unwarranted manner, they may be compelled to perform it in full or in a proper and legal manner.<sup>4</sup> And they cannot evade their duty by meeting and adjourning without action *sine die*, but may be compelled, notwithstanding such adjournment, to meet again and complete their duties.<sup>5</sup>

Bright Elec. Cases, 617; North Whitehall v. South Whitehall, 8 Serg. & R. (Penn.) 116.

<sup>1</sup> Opinion of Judges, 64 Me. 596; Opinion of Judges, 88 Me. 597; Clark v. County Examiners, 126 Mass. 282.

<sup>2</sup> People v. Pease, 27 N. Y. 45, 84 Am. Dec. 242, per SELDEN, J.

<sup>3</sup> Attorney-General v. Board of Canvassers, 64 Mich. —, 81 N. W. Rep. 539, 7 West. Rep. 849; State v. Wilson, — Neb. —, 38 N. W. Rep. 31. Brown v. Rush County, — Kans. —, 17 Pac. Rep. 804; Territory v. Bernallillo County, — N. M. —, 16 Pac. Rep. 855; Clark v. McKenzie, 7 Bush (Ky.) 523; Burke v. Supervisors, 4 W. Va. 371; State v. County Judge, 7 Iowa, 186; Magee v. Supervisors, 10 Cal. 376; Kisler v. Cameron, 39 Ind. 488; Commonwealth v. Emminger, 74 Penn. St. 479; Alderson v. Commissioners, — W. Va. —, 8 S. E. Rep. 274.

<sup>4</sup> State v. County Commissioners, 23 Kans. 284; State v. Hill, 10 Neb. 53; Lewis v. Commissioners, 16 Kans. 102, 22 Am. Rep. 275.

<sup>5</sup> "When they have figured up the returns exactly as handed over to them," says CAMPBELL, C. J., "they have completed their task and exhausted their powers. Until they have done so they have no right to dissolve their meeting. They can only get out of their office by completing its work. It would be worse than absurd to allow a board of canvassers to defeat the popular will and destroy an election by refusing or neglecting to do what the law requires them to do. They may bring themselves within the punishment of the law by such misconduct, but they cannot destroy the vote." Attorney-General v. Board of Canvassers, 64 Mich. —, 81 N. W. Rep. 539, 7 West. Rep. 849. To same effect, State v.

But inasmuch as the issuing of a mandamus rests largely in the discretion of the court, it will not be awarded where it is apparent upon the face of the returns that the election was illegal,<sup>1</sup> or where it appears that there was no vacancy,<sup>2</sup> or that the returns were forged and illegal,<sup>3</sup> or where, for any reason, it would be unavailing.<sup>4</sup>

So, of course, the writ will not be granted before the time when it is the duty of the board to act,<sup>5</sup> or unless it is the clear duty of the officers complained of to make the canvass.<sup>6</sup>

§ 211. Board can act but once.—But having once met and fully completed their duty, their powers are exhausted and they cannot again meet and re-canvass the votes or reverse their prior decision and announce a different result.<sup>7</sup>

§ 212. Canvassers' Findings not conclusive.—The finding of the canvassers and the certificate of election issued by them, if any, are *prima facie* evidence of the result and of the title to the office of those declared elected, and this evidence is conclusive in all collateral inquiries.<sup>8</sup> But such finding or certificate is not conclusive, unless expressly made so by law, in a direct proceeding to try the title to the office. The fact of having a plurality of the votes lawfully cast is what confers the title to the office<sup>9</sup> and it is always open for the party receiving such plural-

Gibbs, 18 Fla. 55, 7 Am. Rep. 233; Hagerty v. Arnold, 18 Kans. 367; Lewis v. Commissioners, 16 Kans. 102, 22 Am. Rep. 274; *Contra*, Clark v. Buchanan, 2 Minn. 346; People v. Supervisors, 12 Barb. (N. Y.) 217; State v. Rodman, 43 Mo. 256.

<sup>1</sup> State v. Stevens, 23 Kans. 456, 38 Am. Rep. 175, where the returns to the board showed that there were 2,947 votes cast in a county which contained only 800 legal voters. State v. Whittemore, 11 Neb. 175.

<sup>2</sup> Peters v. Canvassers, 17 Kans. 365.

<sup>3</sup> State v. Kavanaugh, — Neb. —, 39 N. W. Rep. 431.

<sup>4</sup> High. Ex. Leg. Rem. § 14.

<sup>5</sup> State v. Carney, 8 Kans. 88. And the fact that they threaten not to per-

form their duty when the time arrives will not alter the rule.

<sup>6</sup> State v. Randall, 85 Ohio St. 64.

<sup>7</sup> Holden v. Village Council, — Minn. —, 84 N. W. Rep. 836; Hadley v. City of Albany, 33 N. Y. 603, 88 Am. Dec. 412; Keller v. Robertson, 27 Mich. 116; State v. Harrison, 38 Mo. 540; Swain v. McRae, 80 N. C. 111; Bowen v. Hixon, 45 Mo. 340; State v. Donewirth, 21 Ohio St. 216; Opinion of Judges, 117 Mass. 599.

<sup>8</sup> Louisville R. R. Co. v. Davidson County, 1 Sneed (Tenn.) 637, 63 Am. Dec. 424; Prettyman v. Supervisors, 19 Ill. 406, 71 Am. Dec. 230; People v. Cicott, 16 Mich. 283, 97 Am. Dec. 141; People v. Pease, 27 N. Y. 45, 84 Am. Dec. 242.

<sup>9</sup> People v. Kilduff, 15 Ill. 492, 60

ity, unless otherwise expressly provided by law, to go behind the certificate or the returns and to establish this fact before the appropriate tribunal, although the canvassers may have decided otherwise.<sup>1</sup> This tribunal is usually the ordinary courts of law, but in some States special tribunals have been established for the purpose of deciding election contests.

### 9. Contested Elections.

§ 213. **The Right to contest.**—The duties of the canvassing officers being, as has been seen, generally merely of a ministerial nature, and their certificate of election being the *prima facie* evidence of election,<sup>2</sup> it is competent for a defeated candidate<sup>3</sup> who has not himself caused or contributed to the irregularities or frauds of which he complains,<sup>4</sup> or for the people,<sup>5</sup> or, in some instances, for any elector<sup>6</sup> to institute proceedings for the determination of the title to the office.

Where, however, the decision of the canvassing officers is expressly made the final one, no further remedy can, in general, be had.

§ 214. **The Tribunal.**—In several of the States, special tribunals have been created for the trial of election contests, but, where this is not the case, the ordinary courts of law are to be

Am. Dec. 769; *State v. Draper*, 50 Mo. 353.

<sup>1</sup> *People v. Van Cleve*, 1 Mich. 362, 53 Am. Dec. 69; *People v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *People v. Cicott*, 16 Mich. 233, 97 Am. Dec. 141; *Prince v. Skilkin*, 71 Me. 361, 36 Am. Rep. 325; *People v. Seaman*, 5 Denio, (N. Y.) 409; *Attorney-General v. Barstow*, 4 Wis. 567; *Attorney-General v. Ely*, 4 Wis. 420; *Dishon v. Smith*, 10 Iowa, 212; *State v. Fetter*, 12 Wis. 566; *State v. Avery*, 14 Wis. 122; *People v. Jones*, 20 Cal. 50; *Commonwealth v. Jones*, 10 Bush. (Ky.) 725; *Echols*

*v. State*, 56 Ala. 181; *Reynolds v. State*, 61 Ind. 392; *Winter v. Thistlewood* 101 Ill. 450; *People v. Matteson*, 17 Ill. 167; *State v. Justices*, 1 N. J. 244; *Hill v. Hill*, 4 McCord, S. C., 277; *State v. Passaic*, 25 N. J. 354; *Newcum v. Kirtley*, 13 B. Monr. (Ky.) 515.

<sup>2</sup> See *ante*, § 212.

<sup>3</sup> See *Edwards v. Knight*, 8 Ohio, 375. See also *post*, § 490.

<sup>4</sup> *Louisville R. R. Co. v. Davidson Co.*, 1 Sneed (Tenn.) —, 63 Am. Dec. 424.

<sup>5</sup> See *post*, § 488.

<sup>6</sup> See *Edwards v. Knight*, 8 Ohio, 375. See also *post*, § 490.

resorted to. Where such a special tribunal has been created, individuals desiring to institute proceedings must, where such appears to have been the intention, have recourse to that tribunal alone, and can not, in general, resort to the courts of law.<sup>1</sup>

Provisions in the charters of municipal corporations that the common council or other governing body shall be the judge of the qualification and election of its own members and of those of other officers of the corporation, do not ordinarily operate to oust the courts of law of their jurisdiction. In order to effect this result it must be expressly provided that no court shall take cognizance by *quo warranto*, or that the council shall have the *sole* or *final* power of decision.<sup>2</sup>

But a provision in the constitution of the State that each house of the legislature shall judge of the qualifications, election and return of its members, confers upon each house powers of a judicial nature in the exercise of which its decision is final and not subject to review by the courts.<sup>3</sup>

So a special remedy given to an elector to contest an election does not deprive the people of their remedy by *quo warranto* to inquire into the title to public offices. "The two remedies are distinct, the one belonging to the elector in his individual capac-

<sup>1</sup> *State v. Marlow*, 15 Ohio St. 114; *State v. Taylor*, 15 Ohio St. 137; *Lord v. Every*, 38 Mich. 405; *Commonwealth v. Garrigues*, 28 Penn. 9, 70 Am. Dec. 108; *Commonwealth v. Henszey*, 81½ Penn. St. 101.

Equity will not interpose where a special statutory course is provided. *Dickey v. Reed*, 78 Ill. 261.

<sup>2</sup> *State v. Kempf*, 69 Wis. 470, 2 Am. St. Rep. 753.

*Dillon's Munic. Corp.* § 202, citing *In re Heath*, 4 Hill, (N. Y.) 42; *State v. Fitzgerald*, 44 Mo. 425; *Commonwealth v. McCloskey*, 2 Rawle (Pa.) 369; *In re Strahl*, 16 Iowa, 369; *State v. Funck*, 17 Iowa, 365; *Kane v. People*, 4 Neb. 509; *Batman v. McGowan*, 1 Metc. (Ky.) 538; *Wammack v. Holloway*, 2 Ala. 31; *Hummer v. Hummer*, 3 G. Greene, (Iowa) 49; *Macklot v. Davenport*, 17 Iowa,

379; *Gass v. State*, 34 Ind. 425; *Commonwealth v. Allen*, 70 Penn. 463; *Linegar v. Rittenhouse*, 94 Ill. 208; *Oregon v. McKinnon*, 8 Oreg. 485. See also *People v. Hall*, 80 N. Y. 117; *Kendall v. Camden*, 47 N. J. 64, 54 Am. Rep. 117. But see *People v. Metzker*, 47 Cal. 524; *People v. Mayor*, 41 Mich. 2; *Mayor v. Morgan*, 7 Mart. (La.) 1, 18 Am. Dec. 232; *Peabody v. School Committee*, 115 Mass. 383; *Commonwealth v. Leech*, 44 Penn. 333; *Commonwealth v. Meesser*, 44 Penn. 341; *People v. Harshaw*, 60 Mich. 200; *Cooley v. Ashley*, 43 Mich. 458; *Alter v. Simpson*, 46 Mich. 188; *Doran v. DeLong*, 43 Mich. 553.

<sup>3</sup> *People v. Mahaney*, 13 Mich. 481; *State v. Gilman*, 20 Kans. 551, 27 Am. Rep. 189. But see *State v. Francis*, 26 Kans. 724.



ity as a power granted, and the other to the people in the right of their sovereignty.”<sup>1</sup>

The right and power to adjudicate upon the title to a public office, belong, it is held, to the courts as such, and cannot be conferred upon a single member of the court.<sup>2</sup>

§ 215. **The Procedure—Statutory Remedies.**—In many of the States, also, special forms of procedure for the contest of election cases have been provided. Where such is the case, the machinery so provided must, by individuals<sup>3</sup> and, usually, by the people,<sup>4</sup> be made use of in preference to the remedies awarded by the common law.

Where the statutory remedy is given to any particular person or class of persons, as to “any candidate or elector,” proceedings instituted by an individual under the statute must show upon their face that the person so prosecuting is the person or one of the class of persons to whom the statutory remedy is given.<sup>5</sup>

§ 216. **Where no statutory Method, Quo Warranto is the Remedy.**—Where no special remedy is provided, the common law remedy by an information in the nature of a *quo warranto* must be resorted to.

As the nature and use of this writ will be made the subject of a special chapter no discussion of it will here be had.<sup>6</sup>

<sup>1</sup> *People v. Holden*, 28 Cal. 123. But see *Commonwealth v. Garrigues*, 28 Penn. St. 9, 70 Am. Dec. 103, where the state was held bound by a statute prescribing the mode of contesting elections.

<sup>2</sup> *In re Cleveland*, — N. J. — 17 Atl. Rep. 772.

<sup>3</sup> *State v. Marlow*, 15 Ohio St. 114; *People v. Holden*, 28 Cal. 123; *Dickey v. Reed*, 73 Ill. 261; *Commonwealth v. Garrigues*, 28 Penn. 9, 70 Am. Dec. 103; *Commonwealth v. Baxter*, 35 Penn. 263; *Commonwealth v. Leech*, 44 Penn. 332.

For various rulings upon such statutes see: *Glidewell v. Martin*, — Ark. —, 11 S. W. Rep. 882; *Whitney v. Blackburn*, — Oreg. —, 21 Pac. Rep. 874; *Burke v. Perry*, —

Neb. —, 42 N. W. Rep. 401; *Gumm v. Hubbard*, — Mo. —, 11 S. W. Rep. 61; *Vigil v. Pradt*, — N. Mex. —, 20 Pac. Rep. 795; *Hartman v. Young*, — Oreg. —, 20 Pac. Rep. 17.

<sup>4</sup> That such statutory methods are binding on the state is held in *State v. Marlow*, 15 Ohio St. 114; *Commonwealth v. Garrigues*, 28 Penn. 9, 70 Am. Dec. 103; *Commonwealth v. Baxter*, 35 Penn. 263; *Commonwealth v. Leech*, 44 Penn. 332.

But the contrary is held in *People v. Holden*, 28 Cal. 123.

The court will not interfere on *quo warranto* while a contest is going on under the statute. *State v. Taylor*, 15 Ohio St. 137.

<sup>5</sup> *Edwards v. Knight*, 8 Ohio, 375.

<sup>6</sup> See *post*, § 476, *et seq.*

§ 217. **Mandamus not the Remedy.**—As has been seen,<sup>1</sup> mandamus will lie to compel the canvassers of the election to perform their duty, and it will also lie to compel them to issue the proper certificate to the person they declare elected.\* And it is no objection to this use of the writ that the office is already filled by an incumbent *de facto*,<sup>3</sup> nor that the certificate has already been erroneously issued to another person,<sup>4</sup> unless proceedings are then pending to procure relief in some other manner,<sup>5</sup> or unless the writ would give no substantial relief, a resort to *quo warranto* being inevitable.<sup>6</sup>

But the writ will not lie to require the canvassers to find that any particular person is elected.

So it is well settled that mandamus will not lie to try the title to the office or to compel admission to it, or to obtain the possession of it or to oust an usurper from it. In all these cases the party must resort to his remedy by *quo warranto*.<sup>7</sup>

<sup>1</sup> See *ante*, § 210.

<sup>2</sup> *State v. Gibbs*, 18 Fla. 55, 7 Am. Rep. 233; *In re Strong*, 20 Pick. (Mass.) 484; *People v. Rives*, 27 Ill. 242; *People v. Hilliard*, 29 Ill. 419; *Brower v. O'Brien*, 2 Ind. 428; *Kisler v. Cameron*, 39 Ind. 488; *State v. Circuit Judge*, 9 Ala. 338; *Ellis v. Commissioners*, 2 Gray (Mass.) 370; *Clark v. McKenzie*, 7 Bush (Ky.) 523; *Pacheco v. Beck*, 52 Cal. 8.

<sup>3</sup> *In re Strong*, 20 Pick. (Mass.) 484.

<sup>4</sup> *Ellis v. Commissioners*, 2 Gray (Mass.) 370; *Clark v. McKenzie*, 7 Bush (Ky.) 523; *State v. Lawrence*, 3 Kans. 95; *People v. Rives*, 27 Ill. 242; *People v. Hilliard*, 29 Ill. 419.

<sup>5</sup> *People v. Cover*, 50 Ill. 100.

<sup>6</sup> *Sherburne v. Horn*, 45 Mich. 160.

<sup>7</sup> *People v. New York*, 3 Johns. Cas. (N. Y.) 79; *St. Louis County Court v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355; *State v. Rodman*, 43 Mo. 256; *State v. Dunn*, Minor (Ala.) 46, 12 Am. Dec. 25; *Ex parte Harris*, 52 Ala. 87, 23 Am. Rep. 559; *People v.*

*Supervisors*, 12 Barb. (N. Y.) 217; *People v. Common Council*, 18 Mich. 338; *Underwood v. White*, 27 Ark. 382; *Commonwealth v. Commissioners*, 6 Whart. (Penn.) 476; *People v. Lane*, 55 N. Y. 217; *In re Gardner*, 68 N. Y. 467; *Denver v. Hobart*, 10 Nev. 28; *Meredith v. Supervisors*, 50 Cal. 433; *Duane v. McDonald*, 41 Conn. 517; *Harrison v. Simonds*, 44 Conn. 818; *Brown v. Turner*, 70 N. C. 93; *People v. Stevens*, 5 Hill (N. Y.) 629; *Wood v. Fitzgerald*, 8 Oreg. 568; *Bonner v. State*, 7 Ga. 473; *State v. Auditor*, 36 Mo. 70; *People v. Matteson*, 17 Ill. 167; *People v. Head*, 25 Ill. 325; *Hill v. Goodwin*, 56 N. H. 441; *Ellison v. Raleigh*, 89 N. C. 125; *King v. Mayor of Winchester*, 7 A. & E. 81; *Queen v. Derby*, 7 A. & E. 135; *King v. Oxford*, 6 A. & E. 348; *Frost v. Chester*, 5 E. & B. 538; *Queen v. Phippen*, 7 A. & E. 966; *McGee v. State*, — Ind. —, 1 West. Rep. 467; *French v. Cowan*, 79 Me. 426, 10 Atl. Rep. 335.

§ 218. **Same Subject—The Rule stated.**—Judge McCrary in his treatise on Elections<sup>1</sup> deduces the following rules:—

1. If the officers of election refuse or fail to act, mandamus will lie to compel them to discharge their duties as required by statute; but in such cases the writ will not, as a general rule, command such officers to certify that any particular person has been elected.

2. If there are two or more persons claiming the office, the writ will never issue to require such officers to declare either one elected, but only to command them to execute the duties and exercise the functions conferred upon them by law.

3. If it clearly appears that a particular person has received the majority of the votes cast, and that no question is made upon this point, perhaps mandamus may issue to compel such officers to certify the election of that person by name, although this is substantially the same thing as to order them to certify the result according to law, and therefore the latter form will always be found to be the best.

§ 219. **Presumption of Regularity.**—The well settled presumptions of the regularity of official action and that things required to be done have been rightly done, apply here as in other cases. The presumption is, therefore, that the election has been properly conducted, and that the officers charged with the duty of ascertaining and declaring the result have discharged that duty faithfully.<sup>2</sup> Hence.—

§ 220. **Burden of Proof is upon Contestant.**—The burden of proving such irregularities or defects, as shall overturn the result as declared by the canvassers, rests upon him who alleges them.<sup>3</sup>

§ 221. **Presumption of Regularity may be overthrown.**—But the presumption above referred to, while conclusive in collateral inquiries, is not, as has been seen,<sup>4</sup> conclusive in direct proceedings to test the title, and the courts are at liberty to go behind the returns and ascertain the true result as indicated by the ballots of the electors.<sup>5</sup>

<sup>1</sup> 3d ed. § 388.

<sup>2</sup> McCrary on Elections § 424.

<sup>3</sup> McCrary on Elections § 424.

<sup>4</sup> See *ante* § 218.

<sup>5</sup> See *Kreitz v. Bahrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 849.

§ 222. **Distinction between defective Elections and defective Returns.**—An important distinction is to be observed between a void election and invalid returns. "To set aside the returns of an election," says Judge McCrery,<sup>1</sup> "is one thing; to set aside the election itself is another and very different thing. The return from a given precinct being set aside, the duty still remains to let the election stand, and to ascertain from other evidence the true state of the vote. The *return* is only to be set aside, as we have seen, when it is so tainted with fraud, or with the misconduct of the election officers, that the truth can not be deduced from it. The *election* is only to be set aside when it is impossible from *any evidence* within reach, to ascertain the true result,—when neither from the returns nor from other proof, nor from all together, can the truth be determined."

§ 223. **Irregularities not affecting Result may be ignored.**—As has been seen in an earlier section,<sup>2</sup> it is well settled that, where an election has been in fact had, and the great body of the electors have actually participated in it, irregularities not proceeding from a wrongful intent, in the manner of calling, holding or certifying the election, will, where they do not affect the result, be ignored. Hence.—

§ 224. **Contestant must show that Irregularities affected Result.**—Whoever contests the validity of an election upon the ground of irregularities in the manner of calling or conducting it, or of the reception of illegal or unauthorized votes, must be prepared to show that the irregularities were of such a nature,<sup>3</sup> or the illegal votes were of such a number,<sup>4</sup> as to materially affect or alter the result.

<sup>1</sup> McCrery on Elections § 488.

<sup>2</sup> See *ante* § 184.

<sup>3</sup> *Piatt v. People*, 29 Ill. 72; *Bacon v. Malzacher*, 103 Ill. 668; *Dale v. Irwin*, 78 Ill. 170; *Barnes v. Supervisors*, 51 Miss. 305; *Trimmer v. Bomar*, 20 S. C. 854; *Coffey v. Edmonds*, 58 Cal. 521; *Campbell v. Braden*, 81 Kana. 754; *Whipley v. McKune*, 12 Cal. 852; *Taylor v. Taylor*, 10 Minn. 107.

<sup>4</sup> "The rule prevails in every State,"

says APPLETON, C. J. in *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 235, "that an election is not to be set aside and declared void merely because certain illegal votes were received which do not change the result of the election. *People v. Tuthill*, 81 N. Y. 550; *Judkins v. Hill*, 50 N. H. 140; *School District v. Gibbs*, 2 Cush. (Mass.) 89. In *Ex parte Murphy*, 7 Cow. (N. Y.) 153, two ballots were put in the box on the names of two persons who were

Courts incline rather to sustain than to overthrow an election, and will only declare it void where it is clearly illegal.<sup>1</sup> If the defect be such as can be corrected, the correction will be made.\*

But irregularities in the conduct of the election, which materially affect or alter the result, and which are not capable of correction, will render the election void.\*

§ 225. **Mandatory Provisions must be observed.**—So where the statute expressly requires an act to be done or makes its performance essential to the validity of the election, or declares that the election shall be void if it be not observed, the statute must be regarded as mandatory, and an omission to observe the statute will render the election void.<sup>4</sup> What statutes are so mandatory is a question to be determined largely from the consideration of each particular statute.

§ 226. **Effect of Intimidation or Violence—Must affect the Result.**—It is not infrequently attempted to impeach an election upon the ground that voters were intimidated or were prevented from voting by actual or threatened violence. Upon the question of the sufficiency of such acts to defeat the election, the rule given by Judge McCrory has been approved:—

“The violence and intimidation should be shown to have been sufficient either to change the result, or that by reason of it the

formerly voters, but who had died some weeks before the election. ‘To warrant the setting aside the election,’ the court observes, ‘it must appear affirmatively that the successful ticket received a number of improper votes, which, if rejected, would have brought it down to a minority. The mere circumstance that improper votes were received will not vitiate an election.’ The extra vote should never be rejected when it is possible to ascertain the fraudulent vote. *Mann v. Cassidy*, 1 Brewst. (Penn.) 82.”

And to the same effect, see: *Swepton v. Barton*, 89 Ark. 549; *Sprague v. Norway*, 81 Cal. 178; *Sudbury v. Stearns*, 21 Pick. (Mass.) 148; *Tarbox*

*v. Sughrue*, 86 Kans. 225, 12 Pac. Rep. 935.

<sup>1</sup> *State v. Freeholders*, 85 N. J. 269.

<sup>2</sup> *Wheelock's Case*, 82 Penn. 297.

<sup>3</sup> *State v. Judge*, 13 Ala. 805.

<sup>4</sup> *Walker v. Sandford*, 78 Ga. 165, 1 S.E. Rep. 424, where an unauthorized person held the election and it was held at a place different from the one fixed: *Franklin v. Kaufman*, 65 Ga. 260, where the statute required that a justice of the peace should preside but he was present only half of the day: *Ledbetter v. Hall*, 62 Mo. 422; *West v. Ross*, 53 Mo. 350, where ballots were rejected because they had not been numbered as the statute required.

true result cannot be ascertained with certainty from the returns. To vacate an election on this ground, if the election were not in fact arrested, it must clearly appear that there was such a display of force as ought to have intimidated men of ordinary firmness."<sup>1</sup>

Where such violence and intimidation are shown, the election will be set aside, but where the election has actually been had and the mass of the electors have voted, it must be shown that the number of voters prevented from voting was sufficient to change the result or the election must stand.<sup>2</sup>

§ 227. *Impeaching the Returns.*—It is presumed that the officers of election have done their duty, and that the returns made by them are a full and fair statement of the true result, and this presumption is to be given effect until they are shown to be unreliable. And the returns will not be rejected until they have been shown to be so tainted with fraud, or so radically defective or incomplete that the truth can not be deduced from them. Where this is shown, however, the returns will be ignored.<sup>3</sup>

<sup>1</sup> McCrary on Elections § 515; State v. Calvert, 98 N. C. 580. Mere noise and confusion is not enough. *Id.*

<sup>2</sup> Tarbox v. Sughrue, 86 Kans. 225, 13 Pac. Rep. 985; State v. Mason, 14 La. Ann. 505; Augustin v. Eggleston, 12 La. Ann. 866.

<sup>3</sup> Howard v. Cooper, 1 Batr. 275; Blair v. Barrett, 1 Bart. 308; Knox v. Blair, 1 Bart. 521; Washburne v. Voorhees, 2 Bart. 54; Supervisors v. Davis, 68 Ill. 405.

"The returns," says ANDREWS, J. in *People v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 312, "are made by public officers charged with the duty of receiving and canvassing the votes in their respective districts, and the presumption which always exists in favor of the due performance of official duty makes the return and the certificate of the city canvassers evidence of the facts contained in them. But they are *prima facie* evidence only. It had been held in a series of cases

in this State, before the case of *People v. Pease*, 27 N. Y. 45 (84 Am. Dec. 242) that the returns of election officers were open to inquiry and correction to the extent of allowing proof of clerical mistakes and omissions by the inspectors, and that defective ballots, not allowed to the defeated candidate, were intended for him. But the doctrine of the case of *People v. Pease* was much more radical and comprehensive. Starting with the principle that the election, and not the return, is the foundation of the right to an elective office, it was held that it was competent, in an action to try the title, to go behind the ballot box and purge the return by proof that votes were received and counted which were cast by persons not qualified to vote. In that case no fraud or misconduct was imputed to the inspectors. The disputed votes had been received by them in good faith. The right of the persons offer-

And upon the principle *Falsus in uno, falsus in omnibus*, it is held that when the returns are shown to be fraudulent and false in part they must be rejected altogether.<sup>1</sup>

Evidence, therefore, of the admission of illegal votes or the rejection of legal votes, or of fraud, errors or irregularities in the conduct of the election, or in canvassing the votes or making the returns, is properly admissible.

It is not necessary that actual fraud should have been practiced by the election officers in the returns. "They may be impeached for error, and whether the error is that of the inspectors, or arises from the interference or illegal conduct or acts of third persons, is immaterial. The integrity of the returning officers is not necessarily involved in the inquiry as to the truth of the return. They may have been deceived and innocently induced to make a certificate false in fact."<sup>2</sup>

Neither is it necessary, where the returns are fraudulent, to connect the candidate with the fraud, but they are to be rejected although he was innocent.<sup>3</sup>

§ 228. **Correcting the Returns.**—But not only may the returns be impeached upon proof of fraud or mistake, but they may also be corrected, where the means of correction are at hand, so as to conform to the actual state of the case. And they may be corrected by parol evidence as well as by written.<sup>4</sup>

§ 229. **The Ballots as Evidence.**—But it by no means fol-

ing them to vote was not challenged at the time, and the return accurately stated the result of the election as shown by the count of the ballots actually deposited, according to the forms of the law. The case is a strong illustration of the disposition of the courts in this State, in election cases, to look through the formal evidence of the right to the right itself, and to set aside the return of election officers when necessary to promote the ends of justice. Freedom of inquiry in investigating the title to office tends to secure fairness in the conduct of elections, faithfulness and integrity

on the part of return officers, and it weakens the motive for fraud or violence by diminishing the chances that they may prove successful in effecting the objects for which they are usually employed."

<sup>1</sup> Russell v. State, 11 Kans. 308; State v. Commissioners, 35 Kans. 640.

<sup>2</sup> ANDREWS, J., in People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 813.

<sup>3</sup> Blue v. Peter, 40 Kans. 701, 20 Pac. Rep. 442.

<sup>4</sup> People v. Vail, 20 Wend. (N. Y.) 12; Howard v. Shields, 16 Ohio St. 184; Powers v. Reed, 19 Ohio St. 189.

lows that because the returns are of no value, the election must fail.

The returns being rejected, resort may then be had to the source from which the returns were made up,—the ballots themselves if they are still in existence, and have been preserved in the manner prescribed by law.<sup>1</sup> The right to the office comes, as has been seen, from the ballots<sup>2</sup> and not from the certificate or returns, and they are always the best evidence of the voters' action.<sup>3</sup>

But the right to have recourse to the ballots presupposes that they have been kept as required by law, that the guards thrown around them have been preserved and that they still exist in the same integrity as when cast. If they have not been so preserved and if opportunities for alteration, abstraction or corruption have occurred, it is obvious that their value as evidence must be very greatly impaired if not entirely destroyed.<sup>4</sup>

The provisions of the statute as to the exact *manner* in which

<sup>1</sup> People v. Thatcher, 55 N. Y. 525, 14 Am. Rep. 812; People v. Livingston, 79 N. Y. 279; People v. Van Cleve, 1 Mich. 362, 58 Am. Dec. 69; People v. Higgins, 8 Mich. 233; People v. Cicott, 16 Mich. 283, 97 Am. Dec. 141; People v. Cook, 14 Barb. (N. Y.) 259, 8 N. Y. 67, 59 Am. Dec. 451; State v. Judge, 18 Ala. 805; State v. Clerk of Passaic, 25 N. J. 354; Attorney-General v. Ely, 4 Wis. 420; Hudson v. Solomon, 19 Kans. 177; Dorey v. Lynn, 31 Kans. 758; Kingery v. Berry, 94 Ill. 515; Cogan v. Beard, 61 Cal. 58; Newton v. Newell, 26 Minn. 529.

<sup>2</sup> State v. Draper, 50 Mo. 353.

<sup>3</sup> Hudson v. Solomon, 19 Kans. 177; People v. Livingston, 79 N. Y. 279; Wheat v. Ragsdale, 27 Ind. 191; People v. Holden, 28 Cal. 123; Searle v. Clark, 34 Kans. 49.

<sup>4</sup> In Hudson v. Solomon, 19 Kans. 177, BREWER, J. lays down the following rules:

"1. As between the ballots cast at

an election and a canvass of these ballots by the election officers, the former are the primary, the controlling evidence.

2. In order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with."

"Before the ballots should be allowed in evidence to overturn the official count and return, it should appear *affirmatively* that they have been safely kept by the proper custodian of the law,—that they have not been exposed to the public, or handled by unauthorized persons, and that no opportunity has been given for tampering with them." McCrary on Elections, § 440.



the ballots are to be kept, may be directory merely,<sup>1</sup> but the *result* is imperative, and before the ballots can be received in

<sup>1</sup> In passing upon the question in *People v. Livingston*, 79 N. Y. 279, it is said by Chief Judge CHURCH:

"Assuming the construction above indicated as to the sealing, the more important question remains whether, if it is proved satisfactorily that the boxes have been kept inviolate and undisturbed, the omission of the canvassers to seal up the boxes as contemplated, renders the ballots inadmissible as evidence.

The defendant strenuously insists that this omission is fatal to the admission of the ballots as evidence, and that considerations of public policy demand that this exceptional innovation upon the long established policy of the State in providing against such evidence by requiring the ballots to be destroyed should not be sustained unless the statute is strictly complied with.

There is plausibility and force in the argument, but after careful consideration of the subject and the authorities bearing upon it, I have arrived, with some hesitation, at a conclusion adverse to the defendant's views. It is to be observed that the terms of the statute do not make the admissibility of this evidence depend upon a compliance with the requirements of the act. The statute does not create this evidence, but impliedly recognizes it as evidence. It must be regarded as common law evidence. In *quo warranto* the returns and certificates are deemed only *prima facie* evidence, and the parties are permitted to go behind them and show what took place at the election, the number of votes cast and for whom. An election is for the purpose of ascertaining the will of the

electors, and in controversies of this character that will may be shown by any available legal evidence. The ballots themselves are, of course, the highest and best evidence if they are actually preserved, but the liabilities of tampering and fraud doubtless induced the Legislature to require their destruction. But for the statute, there can be no doubt of their being common law evidence if they are identified. The preservation of the boxes inviolate being the ultimate object of the statute, if that is in fact accomplished the omission to observe all the formalities to secure that object is not fatal to the evidence. Such omission would weaken the force of the evidence and induce greater caution in regarding it, but would not necessarily destroy it. (*People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451.)

We are without precedents in this State, but the tendency of the decisions in those States, where similar laws exist favor this view. In *People v. Higgins* (8 Mich. 288, 61 Am. Dec. 491), the aperture of one of the boxes was left unsealed, and the court held that the provision was directory merely. The case seems not to have been very fully considered. In *People v. Cicott* (16 Mich. 283, 306, 97 Am. Dec. 141), where there was imperfect sealing, the trial judge said there was not the same certainty of their correctness which the law would otherwise have presumed, but submitted it to the jury to determine whether they would rely upon the inspectors' returns or the recount of the ballots, and this was approved by the appellate court. (See also *People v. Sackett*, 14 Mich. 830; *Pradat v. Ram-*

evidence to contradict the official returns, it must be made *affirmatively* to appear that they have in fact been kept inviolate.

sey, 47 Miss. 24; Hudson v. Solomon, 19 Kan. 177.)

Judge COOLEY, who, I infer from his opinion in *People v. Sackett*, (*supra*) regarded with disfavor the evidence of a recount of the ballots, without a substantial compliance with the statute, recognizes the rule above stated. He says: 'If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all; or, if received, that it should be left to the jury to determine upon all the circumstances of the case, whether they constitute more reliable evidence than the inspectors' certificate, which is usually prepared immediately on the close of the election, and upon an actual count of the ballots as then made by the officers whose duty it is to do so; (Cooley's Const. Llm. 625). This rule is quite as favorable to the admissibility of the ballots as can be justified, assuming that no defect or error appears in the returns, either upon their face or by evidence *aliunde*. \* \* \*

The statute requires the ballot boxes to be preserved undisturbed and inviolate, and it is incumbent upon the party offering the evidence to show that they had been so kept; not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. The burden was upon the relator to satisfy the jury that the boxes had remained inviolate. The returns are the primary evidence of the result of an election. They are made immediate-

ly upon canvassing the votes, and the votes are canvassed at the close of the polls in public, and presumably, in the presence of the friends of both parties. The result is at once publicly announced and duplicate returns are filed in different public offices. They may be impeached for fraud or mistake; but in attempting to remedy one evil we should be cautious not to open the door to another and far greater evil. After the election it is known just how many votes are required to change the result, the ballots themselves cannot be identified—they have no ear mark. Everything depends upon keeping the ballot boxes secure, and the difficulty of doing this for several months in the face of temptation and opportunity, requires that the utmost scrutiny and care should be exercised in receiving the evidence, especially as the election of every county and state officer may depend upon a recount of the ballots. \* \* \* Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence; but if not, they are not only the weakest, but the most dangerous evidence. The jury might not be satisfied with the proof of identity, and yet be unable to find from the evidence that actual tampering or fraud had been committed. The question upon whom the burden of proof rests is deemed

"It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty." Unless this can be shown, the evidence to be derived from them can not overthrow the presumption of the regularity of official action which supports the returns.<sup>1</sup>

§ 230. **Poll-Books and Tally Sheets as Evidence.**—Where by law poll-books or tally sheets are required to be kept, showing who has voted and who was legally entitled to vote, resort may be had to these books or sheets when properly kept and identified,<sup>2</sup> to ascertain the number of votes cast and what persons have voted.<sup>3</sup>

§ 231. **Evidence of Election Officers.**—Where the ballots have not been kept as required by law,<sup>4</sup> or after proof of the loss of the tally sheets and poll-books,<sup>5</sup> the evidence of the election officers may be received to show what was the result of the election as counted and declared by them.

§ 232. **Evidence of the Voters.**—"It has always been held, and is not disputed," says Judge CAMPBELL, "that illegal votes do not avoid an election, unless it can be shown that their recep-

material, and an error in this respect has been held fatal (*Lamb v. Camden and Amboy R. R. and T. Co.* 46 N. Y. 271). The rule becomes more important in a case like this on account of the difficulty, if not impossibility, of ever proving actual fraud, and the grave consequences which may flow from the adoption of a contrary rule."

<sup>1</sup> *People v. Livingston*, 79 N. Y. 279; *Hudson v. Solomon*, 19 Kans. 177; *Kingery v. Berry*, 94 Ill. 515; *Coglan v. Beard*, 65 Cal. 58; *Keeler v. Robertson*, 27 Mich. 116; *People v. Thacher*, 55 N. Y. 524, 14 Am. Rep. 312; *Powell v. Holman*, 50 Ark. 85, 6 S. W. Rep. 505.

In *State v. Kempf*, 69 Wis. 470, 2 Am. St. Rep. 753, a demurrer to a *quo warranto* on the ground that there was no averment that the ballots had been preserved in the man-

ner prescribed by law, was overruled, the court holding that the presumption of the due performance of official duty was sufficient without the averment.

<sup>2</sup> Where the poll lists have in fact been kept and are fully identified, it is immaterial that they were not kept in the precise manner pointed out by statute, and it is admissible to show that a person voted at the election, although it is not signed by the inspectors, has no heading denoting its character, and has never been filed in the proper office. *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242.

<sup>3</sup> *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *State v. Donnewirth*, 21 Ohio St. 216.

<sup>4</sup> *Stemper v. Higgins*, 88 Minn. 232, 37 N. W. Rep. 95.

<sup>5</sup> *Wheat v. Smith*, 50 Ark. 266, 7 S. W. Rep. 161.

tion affects the result. And where the illegality consists in the casting of votes by persons unqualified, unless it can be shown for whom they voted, it cannot be allowed to change the result."<sup>1</sup>

It becomes important, therefore, to determine by what means, if any, it can be shown how a voter, claimed to be an unlawful voter, has in fact voted.

§ 233. *Same Subject*—Legal Voter not compelled to state how he voted.—As has been seen, the idea of a secret ballot lies at the very foundation of our system of popular elections, and the courts are jealous in securing its protection.

It is, therefore, well settled that a legal voter will not be compelled to disclose for whom he voted.<sup>2</sup> And as the presumption is that one who votes does so legally rather than illegally, no mere doubt or uncertainty as to the legality of his vote will justify his being compelled to disclose it.<sup>3</sup>

And not only will the legal voter not be compelled to disclose for whom he voted, but, unless he has himself made the contents of his ballot public at the time of voting it, third persons will not be permitted to testify as to its purport.<sup>4</sup>

<sup>1</sup> *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141.

<sup>2</sup> *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *Dixon v. Orr*, 49 Ark. 288, 4 S. W. Rep. 774; *Thompson v. Ewing*, 1 Brewst. 66; *In re McCullough*, 12 Phila. 570; *In re Locust Ward Election*, 4 Penn. L. J. 341; *State v. Hilmantel*, 28 Wis. 309.

But see *People v. Supervisors*, 58 How. Pr. (N. Y.) 145, citing *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242.

<sup>3</sup> *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *In re Locust Ward Election*, 4 Penn. L. J. 341; *In re McCullough*, 12 Phila. 570.

<sup>4</sup> In *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141. CAMPBELL, J., says "Our whole ballot system is based upon the idea that unless inviolable secrecy is preserved concern-

ing every voter's action, there can be no safety against those personal or political influences which destroy individual freedom of choice.

It is altogether idle to expect that there can be any such protection where the voter is only allowed to withhold his own oath concerning the ticket he has voted, while any other prying meddler can be permitted in a court of justice to guess under oath at its contents. If the law could permit an inquiry at all, there is no reason whatever for preventing an inquiry from the voter himself, who alone can actually know how he voted, and who can suffer no more by being compelled to answer than by having the fact established otherwise. The reason why the ballot is made obligatory by our constitution is to secure to every one the

This secrecy of the ballot is not alone protected against testimony by third persons as to its contents, but also from attempted disclosures based upon its color or external appearance.<sup>1</sup>

§ 234. **Same Subject—Voter may disclose voluntarily.**—But although the legal voter can not be compelled to disclose how he voted, he may, if he chooses, waive his privilege of secrecy, and voluntarily disclose the contents of his ballot.<sup>2</sup>

§ 235. **Same Subject—Illegal Voter may be compelled to disclose.**—The privilege of secrecy is, however, one belonging to the legal voter only. Where, therefore, it has been established by other evidence that a person has voted unlawfully, he may be compelled to disclose how he voted,<sup>3</sup> except where his answer might tend to criminate him.<sup>4</sup>

And where the unlawful voter refuses to disclose, or can not remember how he voted, or cannot be found, the fact may be proved by other evidence.<sup>5</sup>

§ 236. **Same Subject—Evidence of Voter's Statements as to his Disqualification or his Vote.**—Although there is some conflict in the authorities, the rule seems to be settled that the evidence of the statements of an alleged unlawful voter as to his disqualification, unless made so contemporaneously with the act of voting as to constitute part of the *res gestæ*,<sup>6</sup> is inadmissible

right of preventing any one else from knowing how he voted, and there is no propriety in any rule which renders such a safeguard valueless."

<sup>1</sup> CHRISTIANCY, J., in *People v. Cicotte*, 16 Mich. 288.

<sup>2</sup> *Dixon v. Orr*, 49 Ark. 238, 4 S.W. Rep. 774; *Kneass's Case*, 2 Pars. 553.

<sup>3</sup> *State v. Hillmantel*, 23 Wis. 422; *Thompson v. Ewing*, 1 Brewst. 67; CHRISTIANCY, J., in *People v. Cicott*, 16 Mich. 283.

<sup>4</sup> *State v. Olin*, 28 Wis. 309.

<sup>5</sup> *People v. Pease*, 37 N. Y. 45, 84 Am. Dec. 242. "Where a voter refuses to disclose, or fails to remember, for whom he voted," says DAVIES, J., in this case, "I think it is competent

to resort to circumstantial evidence to raise a presumption in regard to that fact. Such is the established rule in election cases before legislative committees, which assume to be governed by the legal rules of evidence: *Cushing's Law and Practice of Legislative Assemblies*, Sec. 199, 210; and within that rule it was proper, in connection with the other circumstances stated by the witness, to ask him for whom he intended to vote, not, however, on the ground that his intention, as an independent fact, could be material, but on the ground that it was a circumstance tending to raise a presumption for whom he did vote."

<sup>6</sup> *Patton v. Coates*, 41 Ark. 111;

to establish the fact of such disqualification or how he voted. Such evidence is mere hearsay.<sup>1</sup>

The contrary rule, however, prevails in New York<sup>2</sup> and Wisconsin.<sup>3</sup>

The reason given for holding such statements admissible is "that a person who has voted at an election is always considered as a party, when the result of the election is in controversy, and on that ground his declarations, voluntarily made, are admissible. It is considered to be a question between the voter and the party questioning his vote, and not merely between the party holding the office and him who claims it."<sup>4</sup>

§ 237. Voter not voting, not permitted to state how he would have voted.—A voter who did not vote, though legally entitled to do so, and although he did not vote because he was unlawfully prevented, can not afterwards be permitted to testify that he would have voted for a certain person, notwithstanding that the lawful votes so excluded would, if cast as intended, have changed the result.<sup>5</sup>

The election is to be decided by the number of legal votes actually cast, and not by ascertaining what might have been cast. The election may be held invalid because of the suppression of legal votes, but public policy forbids that, after it is known just how many votes are necessary to change the result, it should be permitted to change it upon the present statement of voters as to their past intentions.<sup>6</sup>

Where one, therefore, receives a majority of the legal votes cast, the opposing candidate cannot be declared elected upon evidence that legal voters, who would have voted for him, offered to vote, but were erroneously denied the right. A new election is the proper remedy in such a case.<sup>7</sup>

Beardstown v. Virginia, 81 Ill. 541;  
Kreitz v. Behrensmeier, 125 Ill. 141,  
8 Am. St. Rep. 349.

<sup>1</sup> Tarbox v. Sughrue, 36 Kans. 225,  
12 Pac. Rep. 935; Gilleland v. Schuy-  
ler, 9 Kans. 533; People v. Commis-  
sioners, 7 Col. 190.

<sup>2</sup> People v. Pease, 27 N. Y. 45, 84  
Am. Dec. 242.

<sup>3</sup> State v. Olin, 23 Wis. 319.

<sup>4</sup> Dixon, C. J., in State v. Olin, 23  
Wis. 319.

<sup>5</sup> Newcum v. Kirtley, 18 B. Mon.  
(Ky.) 515.

<sup>6</sup> Newcum v. Kirtley, 18 B. Mon.  
(Ky.) 515.

<sup>7</sup> Renner v. Bennett, 21 Ohio St.  
431; Newcum v. Kirtley, 18 B. Mon.  
(Ky.) 515.

§ 238. When all Evidence fails Election must be set aside.—  
When, however, notwithstanding a resort to all the legal means of proof, it is still impossible to ascertain, with reasonable certainty, what the true result of the election really is, the election must be set aside.<sup>1</sup>

<sup>1</sup> Russell v. State, 11 Kans. 308; State v. Commissioners, 85 Kans. 640.

## CHAPTER VI.

### OF ACCEPTANCE OF OFFICE.

#### § 239. In general.

##### I. DUTY TO ACCEPT OFFICE.

- 240. Citizen is under a social Obligation to accept Office.
- 241. Common Law also imposed the Obligation.
- 242. Duty imposed by Statute in some States.
- 243. Acceptance compelled by Mandamus.
- 244. Refusal to accept indictable at common Law.
- 245. Not compelled to serve without Compensation.
- 246. Not compelled to accept second or disqualifying Office.

#### § 247. Acceptance necessary to full Possession of the Office.

- 248. When Acceptance may be given.

##### II. WHAT CONSTITUTES AN ACCEPTANCE.

- 249. Seeking the Office or Consenting to be appointed or elected is not an Acceptance.
- 250. Qualification the best Evidence of Acceptance.
- 251. Effect of Failure to qualify.
- 252. Acceptance presumed from Exercise of Office.

§ 239. In general.—The individual having been, by the action of the appointing power or by the suffrages of the people, selected for the office, it becomes material to ascertain: (1) whether the individual so chosen owes to the power by which he was chosen any duty to accept the office, and if so, (2) what shall be deemed evidence of such acceptance.

## I.

### DUTY TO ACCEPT THE OFFICE.

§ 240. Citizen is under social Obligation to accept Office.—It is impossible that government shall be carried on, and the functions of civil society exercised, without the aid and intervention of public servants or officers, and every person, therefore, who enters into civil society and avails himself of the benefits and protection of the government, must owe to this society, or, in other words, to the public, at least a social duty to bear his



share of the public burdens, by accepting and performing, under reasonable circumstances, the duties of those public offices to which he may be lawfully chosen.

§ 241. **Common Law also imposed the Obligation.**—And not only is this the social obligation, but so far as municipal offices are concerned, it was the obligation of the common law as well. "In England," says Mr. Justice BRADLEY, "a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear."<sup>1</sup>

§ 242. **Duty imposed by Statute in some States.**—This duty to accept and qualify for a municipal office, except where by law exempt, is also declared by statute in some of the States, and penalties or forfeitures are prescribed for a refusal or neglect to do so.

Under our political system, however, where offices are so eagerly sought for, there has seldom been occasion for the enforcement of such laws.<sup>2</sup>

§ 243. **Acceptance compelled by Mandamus.**—At the common law, a person elected or appointed to a municipal office, as for example, that of common councilman, was compelled by mandamus to qualify by taking the oath, and to enter upon and execute the duties of the office.<sup>3</sup>

§ 244. **Refusal to accept indictable at Common Law.**—And the refusal to accept a municipal office, as that of constable or overseer of the poor, rendered the delinquent liable, at common law, to an indictment.<sup>4</sup>

§ 245. **Not compelled to serve without Compensation.**—But in this country, it is said, though it cannot be universally true, that a person can not be compelled to serve the public without

<sup>1</sup> Edwards v. United States, 108 U. S. 471, 473; Rex v. Bower, 1 B. & C. 585; Rex v. Burder, 4 T. R. 778; Rex v. Lone, 2 Strange, 920; Rex v. Jones, 2 Strange 1146.

<sup>2</sup>See Haywood v. Wheeler, 11

Johns. (N.Y.) 432; Winegar v. Roe, 1 Cow. (N.Y.) 258.

<sup>3</sup>Rex v. Bower, 1 Barn. & Cress. 585.

<sup>4</sup>Rex v. Burder, 4 T. R. 778; Rex v. Lone, 2 Strange, 920.

compensation. Thus in a recent case in Illinois involving the constitutionality of an act creating a board of police commissioners, it was said by SCHOLFIELD, J., though *arguendo* merely, "No man can be compelled to give his time and labor, any more than his tangible property, to the public without compensation; and, since there is no mode by which policemen appointed by the commissioners can be compensated, it follows that no one, even after accepting their appointment can be compelled to perform any police duties."

And so, continues the same judge, "there can be no legal right in an individual to hold an office or trust, unless there is also a corresponding legal right in the public to compel performance of the duties with which the office or trust is charged. This would seem to be a legal truism and to need no demonstration."<sup>1</sup>

§ 246. **Not compelled to accept a second or a disqualifying Office.**—So it is said that a man cannot be compelled to accept a second office when he has previously been chosen to one which he still holds,<sup>2</sup> and that where he has been elected or chosen against his will or consent, he cannot be compelled to accept any office, at any rate, a disqualifying one—as a judicial office, the election to which renders him, during the term for which he was elected, ineligible to any office of trust or profit under the State, other than a judicial one.<sup>3</sup>

<sup>1</sup> *Hinze v. People* (1879), 93 Ill. 406.

<sup>2</sup> *Hartford v. Bennett*, 10 Ohio St. 441.

<sup>3</sup> *Smith v. Moore* (1888) 90 Ind. 294.

ELLIOTT, J., in his opinion, says: "It can not be doubted that when it is said of one that he is elected to an office, it is ordinarily meant that he has been chosen or selected. It is never meant, I think it not too much to say, that he has been chosen and has also been inducted into office, or has qualified by giving bond and taking an official oath. All will agree, I dare say, that as to the public, the candidate who has been legally chosen is elected when so declared

by the proper authorities. As to the public then, the question is without difficulty, for the candidate declared chosen is elected.

A citizen, however, has individual rights, and it would result in injury and lead to injustice to declare that whenever he is chosen to the office of justice of the peace, or any other judicial office, he can seek no political preferment, even though he may have been chosen against his will. A construction of the constitution that would result in making a man a judicial officer against his will would put it in the power of those desiring to obstruct his way to other offices to

§ 247. **Acceptance necessary to full Possession of the Office.**—But, regardless of the questions whether a man can be compelled to accept office, or can be punished for not accepting, it is clear that, though entitled to the office or charged with the duty of accepting it, the individual chosen can not be deemed to be either fully possessed of its rights and privileges or subject to the performance of its duties and obligations, until he has in fact, accepted it. Acceptance, therefore, is necessary to the full possession, enjoyment and responsibility of the office.<sup>1</sup>

§ 248. **When Acceptance may be given.**—The acceptance of an office and the agreement to accept are obviously different things. One is executory, the other executed. If the promise is made before the election or appointment, it is necessarily conditioned upon the contingency of his being elected or appointed. If made afterward, the promisor may not be able or may not be willing to fulfill his promise. The acceptance, therefore, must logically follow the election or appointment, and not precede it.<sup>2</sup>

disfranchise him, and this the constitution never intended should occur. We can not, therefore, I agree, hold that a man selected or chosen against his will or consent is, so far as concerns his own rights, elected within the meaning of the constitution, however it may be as to the public.”

<sup>1</sup> Smith v. Moore, 90 Ind. 294, 306, 313.

<sup>2</sup> Smith v. Moore, 90 Ind. 294. But ELLIOTT, J., dissented, saying: “The majority of the court think that acceptance can only come after election and by qualification, and I, that it may come before as well as after, and that election and qualification are essentially distinct and different things. To my mind it is clear that consent or acceptance may be given as effectually before as after election; that an acceptance is acceptance whensoever made.

I cannot see that it is any more difficult to prove acceptance before an election than it is to prove it afterwards. In any event, it is a question of fact to be determined like all other questions of fact, upon evidence. If it leads to a *reductio ad absurdum* in the one case, to hold consent essential, it no less does so in the other. It seems to me that it is much more unreasonable to permit a man to cast aside an office which he has sought after he has secured the votes of the electors by his own efforts, than to hold that when he has done this he must abide the consequences of his own voluntary act. If men are not held to keep what they have sought and obtained, they are at unrestrained liberty to lightly toss about offices conferred upon them at their own solicitation.”

## II.

## WHAT CONSTITUTES AN ACCEPTANCE.

§ 249. Seeking the Office or Consent to be appointed or elected is not an Acceptance.—Pursuing the reasoning of the last section a step further, it is obvious that the mere seeking for the office or the consent to be voted for or appointed, though they may imply a promise to accept if elected or appointed, do not of themselves amount to an actual acceptance of the office.

*A fortiori* an election or appointment without one's knowledge or consent can not amount to an acceptance of the office.<sup>1</sup>

§ 250. Qualification the best Evidence of Acceptance.—But the best formal evidence of the acceptance is, undoubtedly, the

<sup>1</sup> In *Smith v. Moore*, 90 Ind. 294, the question arose whether one elected, with his consent, to a judicial office, but who does not accept the same, may, under the constitution of that State declaring that "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the State, other than a judicial office," be afterwards elected to an office, not judicial, the term of which will run during the judicial term to which he was elected. It was held that he could be.

ZOLLARS, J., writing for the court, said: "An office is not obtained or held by contract. *McCrary on Elections*, §16, *Pomeroy Const. Law*, § 547. It can not be said, with reason, that such consent to be voted for is, in any sense, an acceptance of the office. Until the consenting party is known to have received a majority vote, there is nothing for him to accept. If being voted for and receiving a majority of the votes is an election, in the sense in which the word 'elected'

is used in this section of the constitution, it can make no difference whether such votes are cast with or without the knowledge and consent of the party voted for. To say that if the votes are cast with the knowledge and consent of the party voted for, he is thereby elected, and, if without such knowledge, he is not elected, is to depart from the literal signification of the word 'elected.' To adopt this view, it would become necessary to construe the word 'elected,' and make the constitution read: No person elected, with his knowledge and consent, to a judicial office, shall be eligible, &c. And further, it would impose upon the courts, in every case of contest like this, under this section, the unreasonable and difficult duty of deciding whether or not the party thus elected was voted for with his knowledge and consent."

ELLIOTT, J., dissented, holding that consenting to be voted for amounted to an acceptance. See extract from his opinion in note to preceding section.

qualification of the officer elect, by taking the oath and giving the bond, if any, required by law.<sup>1</sup>

§ 251. **Effect of Failure to qualify.**—A failure or neglect to qualify at all would, *converso*, be deemed evidence of a refusal of the office.<sup>2</sup> But a failure or neglect to qualify within the particular time prescribed, if afterwards supplied, would not ordinarily be deemed *ipso facto* a rejection of the office.<sup>3</sup> It would be different, however, if the qualification within a given time was expressly made a condition precedent.<sup>4</sup>

§ 252. **Acceptance presumed from Exercise of Office.**—And so if the officer were found to be in the actual occupation and exercise of the office, his acceptance of it would be presumed.<sup>5</sup>

<sup>1</sup> Smith v. Moore, 90 Ind. 294.

<sup>2</sup> Thompson v. Holt, 52 Ala. 491;  
Beebe v. Robinson, 52 Ala. 66.

<sup>3</sup> See City of Chicago v. Gage, 95 Ill. 598, 35 Am. Rep. 182; People v. Holley, 12 Wend. (N. Y.) 481; State v. Churchill, 41 Mo. 41; State v. County Court, 44 Mo. 230; Sprowl v. Lawrence, 33 Ala. 674; State v. Ely, 43 Ala. 568; State v.

Colvig, 15 Oreg. 57; State v. Peck, 30 La. Ann. I. 280.

But see State v. Matheny, 7 Kana. 327 (Compare Carpenter v. Titus, 23 Kana. 7). See *post*, § 266.

<sup>4</sup> See Thompson v. Holt, 52 Ala. 491; Beebe v. Robinson, 52 Ala. 66. See *post*, § 265.

<sup>5</sup> Johnston v. Wilson, 2 N. H. 202, 9 Am. Dec. 5.

## CHAPTER VII.

### OF QUALIFYING FOR THE OFFICE.

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257. Exemption from taking Oath.

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260. Nor disqualify for Act not a Crime when committed.

261. Oath need not be in Writing unless Law requires it.

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§ 253. *In general.*—The person elected or appointed to a public office is usually required by law, before entering upon the performance of his duties, to do some act by which he shall signify his acceptance of the office and his undertaking to execute the trust confided in him. This act is ordinarily termed *qualification*.

§ 254. *What constitutes Qualification.*—This act generally consists of the taking, and often of subscribing and filing, of an official oath, and, in many cases, of the giving of an official bond in such a penalty and with such sureties as the law prescribes.

Each of these acts requires consideration.

# I.

## THE OATH OF OFFICE.

§ 255. Oath not indispensable.—But although the law usually requires the taking of an oath, it is not indispensable. It is, as has been said, but a mere incident to the office and constitutes no part of the office itself.<sup>1</sup>

§ 256. What Oath to be taken.—The form of oath to be taken by public officers is usually prescribed by the sovereign power, and it is often accompanied by a declaration that no other shall be exacted as a qualification for office.

Thus the constitution of the United States requires that, before entering upon the execution of his office, the President shall take the following oath or affirmation :—

“I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect and defend the constitution of the United States.”<sup>2</sup>

It further provides that—

“The senators and representatives before mentioned; and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this constitution; but no religious test shall be required as a qualification to any office or public trust under the United States.”<sup>3</sup>

So the constitutions of the several States usually provide, as in Michigan, that—

“Members of the legislature, and all officers, executive and judicial, except such officers as may by law be exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation :—‘I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of this State, and that I will faithfully discharge the duties of the office of according to the best of my ability.’ And no other oath,

<sup>1</sup> State v. Stanley, 66 N. C. 59, 8 Am. Rep. 448.

<sup>2</sup> Art. II, sec. 1, p. 8.

<sup>3</sup> Art. VI, p. 8.



declaration or test shall be required as a qualification for any office or public trust.”<sup>1</sup>

§ 257. **Exemption from taking Oath.**—Exemption from the constitutional provisions requiring an oath may be not only express, but may be gathered from the evident intention of the law makers. Thus it is said by SHELDON, J., “Where, by the law, there appears a manifestation of the intention of the legislature that an inferior officer should not be required to take an oath of office, there is, in our opinion, a sufficient exemption by law from taking the oath of office within the intent of the constitutional provision.”<sup>2</sup>

§ 258. **Form prescribed must be substantially followed.**—Where the form of the oath to be administered to a public office is prescribed by law, that form should be substantially observed. Literal adherence to it is not required and a substantial compliance will suffice,<sup>3</sup> but anything less than this will not avail.<sup>4</sup>

This is particularly true where the form prescribed was intended to enforce the recognition and protection by the officer of important constitutional rights of individuals, as in proceedings under the right of eminent domain.

§ 259. **Requirement of Oath cannot vary Constitutional Rights.**—It is obviously beyond the power of the legislature in prescribing the oath to be administered to impose upon the officer tests or requirements greater than those which the constitution has declared shall be sufficient.

§ 260. **Nor disqualify for Act not a Crime when committed.**—Neither is it competent for the State, by its constitution, by the requirement of a given oath, to deprive one of his eligibility to office because of the previous commission of an act which was not punishable when committed.<sup>5</sup>

<sup>1</sup> Art. XVIII, sec. 1.

<sup>2</sup> *School Directors v. People*, 79 Ill. 511.

<sup>3</sup> *Bassett v. Denn*, 17 N. J. L. 432; *Tide Water Canal Co. v. Archer*, 9 G. & J. (Md.) 479; *Hankins v. Callo-way*, 68 Ill. 155; *State v. Trenton*, 35 N. J. L. 485.

<sup>4</sup> *In re Cambria Street*, 75 Penn. 357; *Bohlman v. Railway Co.* 40 Wis. 157; *Bowler v. Drain Commissioner*, 47 Mich. 154; *Chapman v. Clark*, 49 Mich. 305.

<sup>5</sup> See the elaborate discussion of this question in *Cummings v. Missouri*, 4 Wall. (U. S.) 277.

§ 261. Oath need not be in Writing unless Law requires it.—Unless the law expressly requires more, it is sufficient that the oath prescribed be taken; it need not also be in writing or be subscribed by the affiant.<sup>1</sup>

§ 262. Effect of not taking Oath.—Statutes requiring the taking of an oath, like those which require also the giving of a bond, usually require that it shall be done within a specified time. These statutes, however, as will be seen in a following section, are generally construed to be directory merely and not mandatory, and mere delay in taking the oath, if it be afterwards taken with the approval of the public authorities, while it may be ground for a forfeiture while the delay continues, does not amount *ipso facto* to a rejection of the office, and when the oath is so taken, the default is waived.<sup>2</sup>

Under some constitutional provisions, as those of Virginia, requiring the taking of the “anti-duelling” oath as a condition precedent, the failure to take the oath operates to vacate the office.<sup>3</sup>

The requirement that the oath shall be taken within a fixed period does not operate while a contest is pending to determine who is legally entitled to the office and hence required to take the oath prescribed by law.<sup>4</sup>

## II.

### OFFICIAL BONDS.

§ 263. In general.—Public officers to whom are entrusted the collection and custody of public money, and public ministerial officers whose actions may affect the rights and interests of individuals, are usually required to secure the faithful and proper discharge of their duties by giving bonds conditioned to that effect.

As a rule, political, judicial, military and naval officers are not required to give bonds.

<sup>1</sup> Davis v. Berger, 54 Mich. 652.

Johnson v. Mann, 77 Va. 265.

<sup>2</sup> See post, § 265, ante, § 251.

<sup>3</sup> People v. Potter, 63 Cal. 127;

<sup>4</sup> Branham v. Long, 78 Va. 352; Pearson v. Wilson, 57 Miss. 648.

§ 264. **Are required by Law.**—The giving of these bonds is generally required by the law creating the office, and the amount of the penalty, the conditions of the undertaking, and the number and qualification of the sureties are usually prescribed by the same authority.

### 1. *When to be Given.*

§ 265. **Statutes usually directory and not Mandatory.**—The statutes requiring a bond to be given ordinarily prescribe that it shall be given within a fixed time after the officer's election or appointment. These provisions as to time, however, though often couched in most explicit language, are usually construed to be directory only and not mandatory.<sup>1</sup>

§ 266. **Failure to give within Time prescribed does not work a Forfeiture.**—A failure to give the bond within the time prescribed does not, therefore, *ipso facto* work a forfeiture.<sup>2</sup> *A fortiori* is this so, where the failure was through no fault of the officer.<sup>3</sup>

Even though the statute expressly provide that upon a failure to give the bond within the time prescribed, the office shall be deemed vacant and may be filled by appointment, it is generally held that the default is a ground for forfeiture only and not a forfeiture *ipso facto*, and that if, notwithstanding his default, the State or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured,

<sup>1</sup> City of Chicago v. Gage, 95 Ill. 598, 85 Am. Rep. 182; People v. Holley, 12 Wend. (N. Y.) 481; State v. Churchill, 41 Mo. 41; State v. Porter, 7 Ind. 204; State v. Falconer, 44 Ala. 696; Sprowl v. Lawrence, 33 Ala. 674; State v. Ely, 43 Ala. 568; State v. County Court, 44 Mo. 230.

<sup>2</sup> City of Chicago v. Gage, 95 Ill. 598, 85 Am. Rep. 182; People v. Holley, 12 Wend. (N. Y.) 481; State v. Churchill, 41 Mo. 41; State v. County Court, 44 Mo. 230; State v. Porter, 7 Ind. 204; State v. Falconer, 44 Ala. 696; Sprowl v. Lawrence, 33 Ala.

674; State v. Colvig, 15 Oreg. 57; State v. Peck, 30 La. Ann. I. 280; Kearney v. Andrews, 10 N. J. Eq. 70.

*Contra*, People v. Taylor, 57 Cal. 620; *In re* Attorney-General, 14 Fla. 277.

<sup>3</sup> Ross v. Williamson, 44 Ga. 501; State v. Hadley, 27 Ind. 496.

Where the giving of the bond is prevented by the unlawful acts of the officers appointed to receive it, the officer elect is relieved from the necessity of giving it. Culver v. Armstrong, — Mich. —, 43 N. W. Rep. 776.

and it is converted into a title *de jure*, having relation back to the time of his election or appointment.<sup>1</sup>

Where, however, the giving of the bond within the time prescribed is expressly made a condition precedent to the right to the office, the rule would be different.<sup>2</sup>

The provisions of the law requiring the giving of a bond within a fixed period do not apply while a contest is pending to determine who is legally elected and hence required to give a bond.<sup>3</sup>

## 2. Form of Bonds.

§ 267. Terms prescribed by Statute.—The statutes requiring the giving of bonds usually prescribe, with more or less particularity, what shall be their terms and conditions. The object of this is not only to secure uniformity in the conditions, but more especially to provide that the public and those dealing with the officer shall receive all of the protection from the bond that it was the intention of the statute, exacting it, to secure.

§ 268. Statutes are usually directory.—And inasmuch as the substance is ordinarily more to be regarded than the form, it is quite generally held that, unless the statute expressly declares that a bond not executed in the form prescribed shall be void, the statute will be construed to be directory only and a substantial compliance with it will suffice.<sup>4</sup>

Immaterial variations or omissions, therefore, in the bond will not render it void but will be overlooked, while matters in excess of the requirements—redundancies—will be rejected as mere surplusage and the bond will be held valid as though they had not been inserted.<sup>5</sup>

<sup>1</sup> *State v. Toomer*, 7 Rich. (S. C.) L. 216; *Sprowl v. Lawrence*, 33 Ala. 674; *City of Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *State v. Ring*, 29 Minn. 78.

But *contra*, see *State v. Matheny*, 7 Kans. 337. (Compare *Carpenter v. Titus*, 33 Kans. 7.)

<sup>2</sup> See *Thompson v. Holt*, 52 Ala. 491; *Beebe v. Robinson*, 52 Ala. 66; *People v. Taylor*, 57 Cal. 620.

<sup>3</sup> *People v. Potter*, 63 Cal. 127; *Pearson v. Wilson*, 57 Miss. 848.

<sup>4</sup> *Stephens v. Crawford*, 1 Ga. 574, 44 Am. Dec. 680; *Whitehurst v. Hickey*, 8 Mart. (N. S.) La. 589, 15 Am. Dec. 167; *Justices v. Wynn*, Dud. (Ga.) 22; *Boring v. Williams*, 17 Ala. 510; *People v. Slocum*, 1 Idaho, 62; *Quimby v. Adams*, 11 Me. 333; *Boykin v. State*, 50 Miss. 375; *Probate Court v. Strong*, 27 Vt. 202; *Place v. Taylor*, 22 Ohio St. 817.

<sup>5</sup> *Polk v. Plummer*, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; *McCaraher v. Commonwealth*, 5 Watts.

## § 269. Informalities which do not invalidate—Instances.—

Thus that the bond is not taken by the proper persons or in the prescribed manner,<sup>1</sup> or that it was not approved,<sup>2</sup> or was not approved by the designated officer;<sup>3</sup> or that it was not signed or acknowledged in the presence of a particular officer,<sup>4</sup> or that it was given before the time specified,<sup>5</sup> or not until the time fixed had expired,<sup>6</sup> or was not stamped as required,<sup>7</sup> or that the officer who gave it had not been sworn,<sup>8</sup> is immaterial and the bond, if otherwise perfect, will be enforced.

So the fact that the penalty exceeds the amount required by law,<sup>9</sup> or that its recitals are more specific than the statute prescribes,<sup>10</sup> or that it does not recite the title of the officer,<sup>11</sup> or that it was not accompanied by his seal,<sup>12</sup> or that the names of the sureties were not inserted in the body of it,<sup>13</sup> or that it runs to "the People of the State" instead of "the State" as required,<sup>14</sup> or that it names the county as the obligee instead of the People of the State, as prescribed by law,<sup>15</sup> or *vice versa*,<sup>16</sup> or that the justification of the sureties is more comprehensive than required,<sup>17</sup> or that a mistake was made in the name of the obligee,<sup>18</sup> or that his official title was omitted,<sup>19</sup> or that the name

& S. (Penn.) 21, 39 Am. Dec. 106; *Matthews v. Lee*, 25 Miss. 417; *State v. Rhoades*, 6 Nev. 352; *In re Read*, 34 Ark. 239; *Berrien County Treasurer v. Bunbury*, 45 Mich. 79; *United States v. Bradley*, 10 Pet. (U. S.) 343.

<sup>1</sup> *State v. McAlpin*, 4 Ired. (N. C.) 140; *State v. Perkins*, 10 Ired. 333.

<sup>2</sup> *People v. Edwards*, 9 Cal. 286; *McCracken v. Todd*, 1 Kans. 143; *Young v. State*, 7 Gill. & J. (Md.) 258; *Green v. Wardwell*, 17 Ill. 278.

<sup>3</sup> *People v. Johr*, 23 Mich. 461.

<sup>4</sup> *State v. Blair*, 32 Ind. 313.

<sup>5</sup> *Moore v. State*, 9 Mo. 330.

<sup>6</sup> *State v. Rhoades*, 6 Nev. 352; *State v. Cooper*, 58 Miss. 615; *Monteith v. Commonwealth*, 15 Gratt. (Va.) 173.

<sup>7</sup> *State v. Garton*, 32 Ind. 1.

<sup>8</sup> *Bonta v. Mercer County Court*, 7 Bush (Ky.) 576; *Board v. Judice*, 39 La. Ann. 896, 2 S. Rep. 792.

<sup>9</sup> *In re Read*, 34 Ark. 239; *Matthews*

*v. Lee*, 25 Miss. 417; *State v. Rhoades*, 6 Nev. 352; *McCaraher v. Commonwealth*, 5 Watts & Serg. (Penn.) 21, 39 Am. Dec. 106.

<sup>10</sup> *Boring v. Williams*, 17 Ala. 510.

<sup>11</sup> *Wilson v. Cantrell*, 19 Ala. 642.

<sup>12</sup> *Supervisors v. Bird*, 31 Cal. 66.

<sup>13</sup> *Stewart v. Carter*, 4 Neb. 564.

<sup>14</sup> *Tevis v. Randall*, 6 Cal. 632, 65 Am. Dec. 547; *People v. Love*, 19 Cal. 681.

<sup>15</sup> *Bay County v. Brock*, 44 Mich. 45; *Faurote v. State*, — Ind. —, 11 N. East. Rep. 472, followed in a. c. — Ind. —, 21 N. E. Rep. 663.

<sup>16</sup> *State v. Horn*, — Mo. —, 7 S. W. Rep. 116.

<sup>17</sup> *Dorsey v. Smyth*, 23 Cal. 21.

<sup>18</sup> *Charles v. Haskins*, 11 Iowa, 329, 77 Am. Dec. 148; *Pursley v. Hayes*, 22 Iowa, 11.

<sup>19</sup> *Smith v. Wingate*, 61 Tex. 54.

of the township for which the officer elected is not given,<sup>1</sup> or that the penalty had not been fixed by the proper officer,<sup>2</sup> or that the bond has no witnesses,<sup>3</sup> or was not under seal,<sup>4</sup> or that the officer was ineligible,<sup>5</sup> or that one of the sureties did not reside in the proper locality,<sup>6</sup> will not invalidate.

§ 270. **Same Subject—Failure to approve or file.**—So the fact that the officers, charged with the duty of approving or filing the bond, have not performed it, will not defeat the validity of the bond or release the sureties upon it.<sup>7</sup>

§ 271. **When defective statutory Bond good as Common Law Obligation.**—And even though the bond be so defective that it can not operate as a bond under the statute, it is not necessarily wholly invalid. For where, in pursuance of the statute and because of it, an attempt is voluntarily made to execute such a bond as is required, and by virtue of the bond so executed the officer is inducted to the office, such bond, though so defective as to be invalid as a statutory bond, will, if not prohibited by statute or opposed to public policy, be held to be valid as a common law obligation and the principal and sureties will be bound by its terms.<sup>8</sup>

<sup>1</sup> State v. Kirby, 9 Mo. 295.

<sup>2</sup> State v. Lynch, 6 Blackf. (Ind.) 895.

<sup>3</sup> Pierce v. Richardson, 37 N. H. 306.

<sup>4</sup> Redwood County v. Tower, 28 Minn. 45; Board of Education v. Fonda, 77 N. Y. 350; United States v. Linn, 15 Pet. (U. S.) 290; United States v. Hodson, 10 Wall. (U. S.) 395; Morse v. Hodsdon, 5 Mass. 313; Thomas v. White, 13 Mass. 369; Bank v. Smith, 5 Allen (Mass.) 415; Templeton v. Commonwealth — Penn. —, 8 Atl. Rep. 167.

<sup>5</sup> Board v. Judice, 39 La. 896, 2 S. Rep. 792.

<sup>6</sup> State v. Flinn, 77 Ala. 100.

<sup>7</sup> Auditor v. Woodruff, 2 Ark. 78, 53 Am. Dec. 368; Whitehurst v. Hickey, 3 Martin, (N. S.) La. 539, 15 Am. Dec. 167; Jones v. State, 7

Mo. 81; 37 Am. Dec. 180; McCracken v. Todd, 1 Kans. 148; Young v. State, 7 Gill & J. (Md.) 253; Ashkum v. Lake, 12 Ill. App. 25; Boone Co. v. Jones, 54 Iowa, 699; Marshall v. Hamilton, 41 Miss. 229.

<sup>8</sup> Stephens v. Crawford, 1 Ga. 574, 44 Am. Dec. 680; Claassen v. Shaw, 5 Watts (Penn.) 468, 40 Am. Dec. 338; Goodrum v. Carroll, 2 Humph. (Tenn.) 490, 37 Am. Dec. 564; Barnes v. Brookman, 107 Ill. 317; Gradle v. Hoffman, 105 Ill. 147; Pritchett v. People, 6 Ill. 525; Fournier v. Faggett, 4 Ill. 347; Ballingall v. Carpenter, 5 Ill. 306; Todd v. Corvell, 14 Ill. 72; United States v. Mason, 2 Bond. (U. S. C. C.) 183; United States v. Tingey, 5 Pet. (U. S.) 115; United States v. Linn, 15 Pet. (U. S.) 290; United States v. Rogers, 28 Fed. Rep. 607; McRea v. McWilliams, 58

§ 272. **Voluntary Bond in Place of statutory Bond.**—And so where, by law, a bond of a certain nature is required, and the officer instead of giving such an one as the law prescribes, voluntarily gives another with terms and conditions different from those ordained by law, the bond so given will be held binding upon the principal and his sureties.<sup>1</sup>

§ 273. **Purely voluntary Bond not enforced.**—Where, however, there is no provision of law requiring the giving of any bond whatever, it is held that a bond voluntarily given is without consideration and cannot be enforced.<sup>2</sup>

§ 274. **Bond with excessive Condition extorted, void.**—So where the terms and conditions of the bond are prescribed by law, but the officer who takes the bond exacts from the officer giving it, as a condition precedent to his entering or remaining in office and receiving its emoluments, a bond with conditions in excess of those required by law, the bond so given will be deemed to be extorted and will not be enforced.<sup>3</sup>

§ 275. **Bond of de Facto Officer is valid.**—But a bond, otherwise valid, is not rendered void by the fact that the officer who gave it was not in all respects lawfully elected or inducted to the office. If he is an officer *de facto*, exercising the functions of the office, the bond given by him will be binding upon himself and his sureties.<sup>4</sup>

§ 276. **Bond of Deputy valid.**—Statutes which expressly authorize officers to appoint deputies, usually permit or require the taking of bonds from them, and prescribe their terms and

Tex. 328; *People v. Shannon*, 10 Ill. App. 855; *Sheppard v. Collins*, 12 Iowa 570; *Garretson v. Reeder*, 23 Iowa, 21.

<sup>1</sup> *United States v. Tingey*, 5 Pet. (U. S.) 115; *United States v. Bradley*, 10 Pet. (U. S.) 343; *United States v. Linn*, 15 Pet. (U. S.) 290; *United States v. Hodson*, 10 Wall. (U. S.) 895; *Supervisors v. Coffenbury*, 1 Mich. 354.

<sup>2</sup> *State v. Helsey*, 56 Iowa, 404; *State v. Bartlett*, 30 Miss. 624. But *contra*, see *Commonwealth v. Wolbert*,

6 Binn. (Penn.) 292, 6 Am. Dec. 452; *Montville v. Haughton*, 7 Conn. 543. See also *Moses v. United States*, 166 U. S. 571.

<sup>3</sup> *United States v. Humason*, 6 Sawyer, (U. S. C. C.) 199; *United States v. Tingey*, 5 Pet. (U. S.) 115.

<sup>4</sup> *Jones v. Scanland*, 6 Humph. (Tenn.) 195, 44 Am. Dec. 300; *Williamson v. Woolf*, 37 Ala. 298; *People v. Slocum*, 1 Idaho 62; *Commonwealth v. Teal*, 14 B. Monr. (Ky.) 29; *Weston v. Sprague*, 54 Vt. 395.

conditions. Bonds taken under such statutes would be subject to the same considerations which apply to other official bonds.<sup>1</sup>

But even in the absence of such a statute, an officer, expressly or impliedly authorized to appoint a deputy, may take from such deputy a bond conditioned for the faithful discharge of his duty and for the indemnity of his principal, and such a bond, if not contrary to any statute or opposed to public policy, will be valid as a common law obligation.<sup>2</sup>

§ 277. **Effect of Blanks left unfilled.**—The leaving of a blank unfilled in a bond where the sense is not thereby left obscure or the meaning rendered imperfect will not invalidate the bond,<sup>3</sup> nor will the omission of words necessary to the meaning but readily supplied by the context.<sup>4</sup>

Thus the fact that the names of the principal<sup>5</sup> or the sureties<sup>6</sup> are omitted in the body of the bond, or that the name of the township in and for which he was elected is left blank,<sup>7</sup> will not impair the validity of the bond.

But where the name of the obligee is entirely omitted, and is not fixed by law, the bond is void;<sup>8</sup> and so where the principal, in the joint bond of himself and his sureties, omits to sign the bond.<sup>9</sup>

### 3. *Liability of Sureties.*

#### a. Bonds executed in Blank.

§ 278. **When Surety bound by Filling of Blanks.**—The question frequently arises as to the liability of sureties who have signed in blank a bond and delivered it to the officer for completion upon the understanding that it shall be filled by him

<sup>1</sup> *Gradle v. Hoffman*, 105 Ill. 147; *Hubert v. Mendheim*, 64 Cal. 213.

<sup>2</sup> *Mott v. Robbins*, 1 Hill (N. Y.) 21, 37 Am. Dec. 236; *Lucas v. Shepherd*, 16 Ind. 368.

<sup>3</sup> *Knisely v. Shenberger*, 7 Watts. 2 (Penn.) 103; *Partridge v. Jones*, 38 Ohio St. 375.

<sup>4</sup> *DeSota County v. Dickson*, 24 Miss. 150.

<sup>5</sup> *Walbridge v. Spalding*, 1 Doug.

(Mich.) 451; *Moore v. McKinley*, 60 Iowa, 367; *Rader v. Davis*, 5 Lea (Tenn.) 536.

<sup>6</sup> *Stewart v. Carter*, 4 Neb. 564; *Partridge v. Jones*, 38 Ohio St. 375.

<sup>7</sup> *State v. Kirby*, 9 Mo. 295.

<sup>8</sup> *Phelps v. Call*, 7 Ired. (N. C.) L. 262, 47 Am. Dec. 327.

<sup>9</sup> *People v. Hartley*, 21 Cal. 535, 32 Am. Dec. 758.



with a penalty of a certain amount or with specified conditions, and the bond is afterwards filled out by him with a greater penalty or more onerous conditions.

Where such a bond bears upon its face evidence that it has been completed in violation of such a stipulation, or where there is sufficient upon its face to put a reasonably prudent man upon an inquiry by which the facts could have been ascertained, or where the fact of the misapplication of the bond is known to the person who seeks to avail himself of its security, he certainly could not enforce it against the sureties.<sup>1</sup>

But where the bond as actually executed by the principal is fair upon its face, and a person, having a right to rely upon it, has relied upon it in good faith as a perfect bond according to its apparent purport, and has had no notice or knowledge of the breach of the conditions, the surety can not, by the weight of authority and reason, defeat an action by such a person upon the ground that a greater penalty than that authorized was inserted or that it contains more burdensome conditions than those agreed upon.<sup>2</sup>

This rule does not conflict with the more modern rule which permits authority to fill blanks in sealed instruments to be conferred by other than an authority under seal.<sup>3</sup>

<sup>1</sup> *Dair v. United States*, 16 Wall. (U. S.) 1; *People v. Bostwick*, 43 Barb. (N. Y.) 9, 32 N. Y. 445.

<sup>2</sup> *White v. Duggan*, 140 Mass. 18, 54 Am. Rep. 437. "We are aware," said HOLMES, J. "that there are several cases more or less opposed to our conclusion. *People v. Bostwick*, 32 N. Y. 445; *Ohio v. Boring*, 15 Ohio, 507; *United States v. Nelson*, 2 Brock, (U. S. C. C.) 64; *Preston v. Hull*, 23 Gratt. (Va.) 600, 14 Am. Rep. 153, and cases cited. But we think that the prevailing tendency both in this State and elsewhere has been in the direction we have taken. *Thomas v. Bleakie*, 186 Mass. 568; *Butler v. United States*, 21 Wall. (U. S.) 373; *Dair v. United States*, 16 Wall. (U. S.) 1; *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec.

535, *State v. Pepper*, 31 Ind. 76; *Millett v. Parker*, 2 Metc. (Ky.) 608."

To like effect see *Bartlett v. Board of Education*, 59 Ill. 364; *City of Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *McCormick v. Bay City*, 23 Mich. 457.

<sup>3</sup> See Mechem on Agency § 94 and notes.

Upon the older rule requiring authority by sealed instrument, see *Williams v. Crutcher*, 5 How. (Miss.) 71, 35 Am. Dec. 422; *Davenport v. Sleight*, 2 Dev. & Bat. (N. C.) L. 331, 31 Am. Dec. 420; *Burns v. Lynde*, 6 Allen, (Mass.) 305; *Preston v. Hull*, 23 Gratt. (Va.) 600, 14 Am. Rep. 153; *Wunderlin v. Cadogan*, 50 Cal. 613; *Adamson v. Hartman*, 40 Ark. 53; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Hibblewhite v. McMorine*,

## b. Conditional Delivery of Bond.

§ 279. **When Surety bound by Delivery contrary to Condition.**—Analogous to the question considered in the preceding section is that of the liability of sureties who have signed a bond upon the condition that the principal shall, before its delivery, procure it to be signed by other sureties also, or that the ownership of more property shall be sworn to, or that any other lawful act or thing shall be done, and the bond has been delivered in violation of the condition.

Here, as in the former case, if the person seeking to enforce the bond knew, or had, either from the face of the bond or from any other source, notice sufficient to have put him, as a reasonably prudent man, upon an inquiry which would have disclosed the facts, he can not enforce it against the sureties in violation of the condition.<sup>1</sup>

But where the bond as delivered is perfect on its face, and appears to have been duly executed by the several obligors and was delivered and used by the principal without disclosing any stipulation, reservation or condition, and third persons, having a

6 M. & W. 200; *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 391; *Gilbert v. Anthony*, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439.

Upon the more modern rule, permitting such authority to be conferred in the same manner as in case of unsealed instruments. See *State v. Young*, 23 Minn. 551; *Drury v. Foster*, 2 Wall. (U. S.) 24; *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535; *Wiley v. Moor*, 17 Serg. & R. (Penn.) 438, 17 Am. Dec. 696; *Commercial Bank v. Kortright*, 23 Wend. (N. Y.) 348, 34 Am. Dec. 317; *Wooley v. Constant*, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246. *Es parte Decker*, 6 Cow. (N. Y.) 60. *Es parte Kerwin*, 8 Cow. (N. Y.) 118; *Humphreys v. Gullow*, 18 N. H. 335, 38 Am. Dec. 499.

Upon the question of *estoppel* see *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Phelps v. Sullivan*, 140

Mass. 86, 54 Am. Rep. 443; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Van Etta v. Evenson*, 28 Wis. 83, 9 Am. Rep. 480.

<sup>1</sup> *Ward v. Churn*, 18 Gratt. (Va.) 801, 98 Am. Dec. 749; *Pepper v. State*, 22 Ind. 399, 85 Am. Dec. 430; *Pawling v. United States*, 4 Cranch (U. S.) 219; *Fletcher v. Austin*, 11 Vt. 448, 84 Am. Dec. 698; *Duncan v. United States*, 7 Pet. (U. S.) 435.

And in *Ward v. Churn*, 18 Gratt. (Va.) 801, 98 Am. Dec. 749, it was held that where a bond is drawn with the names of the principal and four sureties, and is signed by but three of them, two of whom sign it upon condition that the fourth shall sign it also, but the third signer makes no such condition, it is not only void as to the two who sign conditionally, but as to the third surety also.

right to rely upon the bond, have in good faith relied thereon to their prejudice without any knowledge or notice of the condition, stipulation or reservation, they may hold the sureties liable.<sup>1</sup>

The fact that the bond was delivered to a third person and was by him delivered in violation of the condition will not release the sureties.<sup>2</sup>

Where the bond shows by its recitals or by the insertion of the names, as sureties, of more persons than actually sign it, that it must have been intended to be signed by other sureties as well, it has been held that this, except where the bond is actually delivered to the obligee by the complaining surety himself,<sup>3</sup> is sufficient to apprise one who would rely upon it of such intention.<sup>4</sup>

<sup>1</sup> *Taylor County v. King*, 73 Iowa 153, 5 Am. St. Rep. 666; *Carroll County v. Ruggles*, 69 Iowa 275, 58 Am. Rep. 223; *City of Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Nash v. Fugate*, 24 Gratt. (Va.) 202, 18 Am. Rep. 640, a. c. 32 Gratt. 595, 34 Am. Rep. 730; *State v. Potter*, 63 Mo. 312, 31 Am. Rep. 440; *Trustees of Schools v. Sheik*, 119 Ill. 579, 59 Am. Rep. 330; *Mathis v. Morgan*, 72 Ga. 517, 53 Am. Rep. 847; *Dair v. United States*, 16 Wall. (U. S.) 1; *Brown v. Probate Judge*, 43 Mich. 501; *McCormick v. Bay City*, 23 Mich. 457; *State v. Peck*, 53 Me. 234; *State v. Pepper*, 31 Ind. 76; *Millett v. Parker*, 2 Metc. (Ky.) 603; *Webb v. Baird*, 27 Ind. 368, 39 Am. Dec. 507; *Emmons v. Carpenter*, 55 Ind. 330; *Allen v. Marney*, 65 Ind. 401, 32 Am. Rep. 73; *Smith v. Peoria County*, 59 Ill. 414; *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *Deardorff v. Foresman*, 24 Ind. 481; *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Wild Cat Branch v. Ball*, 45 Ind. 213; *Hunt v. State*, 53 Ind. 331; *Hall v. Parker*, 37 Mich. 590, 26 Am. Rep. 540; *Lyttle v. Cozad*, 21 W. Va. 133; *Mowbray v. State*, 38 Ind. 324; *Rhode v. McLean*,

101 Ill. 467; *Hessell v. Johnson*, 63 Mich. 623.

*Contra*, *Guild v. Thomas*, 54 Ala. 414, 25 Am. Rep. 703, followed in *Smith v. Kirkland*, 81 Ala. 345, 1 S. Rep. 276.

<sup>2</sup> *Taylor County v. King*, 73 Iowa 153, 5 Am. St. Rep. 666.

<sup>3</sup> Where the complaining surety had himself delivered the bond, as a perfect and completed instrument, without giving any notice that he expected the other surety to sign, he was held liable. *State v. Lewis*, 73 N. C. 133, 21 Am. Rep. 461. See also *Harris v. Harris*, 23 Gratt. (Va.) 778.

<sup>4</sup> *Ward v. Ohurn*, 18 Gratt. (Va.) 801, 98 Am. Dec. 749; *Wendlinger v. Smith*, 75 Va. 317; *Markham M. & M. Co. v. Kimmell*, 37 Ind. 573; *Pepper v. State*, 23 Ind. 399, 35 Am. Dec. 430; *Fletcher v. Austin*, 11 Vt. 443, 34 Am. Dec. 693; *Pawling v. United States*, 4 Cranch (U. S.) 219; *Allen v. Marney*, 65 Ind. 401, 32 Am. Rep. 73.

The mere fact that the obligation clause of the bond in the printed form was filled out so as to read "sureties," but no names being filled in as sureties, when the complaining surety signed it, and that the probate judge

So if a bond, which upon its face purports to be the bond of the principal and his sureties, is not signed by the principal, it is held in some States not to be binding upon the sureties,<sup>1</sup> at least unless it appears that they agreed to be bound without him;<sup>2</sup> but in other States such a bond is held binding upon the sureties where there is no notice or knowledge at the time of delivery that they were not to be liable unless the principal also signed.<sup>3</sup>

§ 280. **Same Subject—Forgery of other Surety's Signature.**—The fact that the signature of another surety was forged is held to constitute no defence to a surety who signed the bond supposing the signature to be genuine.<sup>4</sup>

who accepted the bond wrote in the name of the surety who signed the bond, and changed the word "sureties" to "surety," is not sufficient to disclose that the surety signed only on condition that others should sign also. *Brown v. Probate Judge*, 42 Mich. 501, relying on *McCormick v. Bay City*, 23 Mich. 457.

But where a surety signed bond, and entrusted it to the principal on condition that it should also be signed by another whose name appeared in the body of the bond as co-surety, and the principal did not procure the additional signature, but erased that name and delivered the bond, it was held that the surety was not bound. The fact that the additional name had been placed in the bond and had been erased was enough, as the court held, to put a prudent man upon his guard. *Allen v. Marney*, 65 Ind. 398, 32 Am. Rep. 73.

See also *Inhabitants of Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592.

<sup>1</sup> *Bean v. Parker*, 17 Mass. 603; *Russell v. Annabel*, 109 Mass. 72, 12 Am. Rep. 665; *Wood v. Washburn*, 2 Pick. (Mass.) 24; *Ferry v. Burchard*, 31 Conn. 603; *Bunn v. Jetmore*, 70 Mo. 228, 35 Am. Rep. 425

See also *Mayo v. Renfro*, 66 Ga. 408.

<sup>2</sup> *Johnston v. Kimball*, 39 Mich. 187, 33 Am. Rep. 372; *Hall v. Parker*, 39 Mich. 287.

<sup>3</sup> *Trustees of Schools v. Shelk*, 119 Ill. 579, 59 Am. Rep. 830; citing *State v. Bowman*, 10 Ohio 445; *Loew v. Stocker*, 68 Penn. St. 226; *Herrick v. Johnson*, 11 Metc. 34; *Keyser v. Keen*, 17 Penn. St. 330; *Haskins v. Lombard*, 16 Me. 142; *Grim v. School Directors*, 51 Penn. St. 219; *Williams v. Marshall*, 42 Barb. 524; *Miller v. Ferris*, 10 Up. Can. 423.

<sup>4</sup> *Stern v. People*, 102 Ill. 540, where the court held that *Seely v. People*, 27 Ill. 178, 81 Am. Dec. 224, is overruled by *Stoner v. Millikin*, 85 Ill. 218, and that *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 891, in so far as it makes a distinction between commercial and other paper is overruled by *City of Chicago v. Gage*, 95 Ill. 598, 35 Am. Rep. 182; *State v. Baker*, 64 Mo. 167, 27 Am. Rep. 214; *Mathis v. Morgan*, 72 Ga. 517, 53 Am. Rep. 847; *Helms v. Wayne Agr. Co.* 78 Ind. 325, 38 Am. Rep. 147. *Linn County v. Farris*, 52 Mo. 75, 14 Am. Rep. 389, seems to be overruled.

Thus in a recent case it was held that where a surety on a bond given to the State as security for a bank depositary signs it before another surety, whose name precedes his in the body of the bond, but is forged thereto in the signature, and where the name of the same person, as well as that of another whose name appears before that of the complaining surety in the body of the bond, appears as being signed to an affidavit that they were worth a certain sum, but in fact their names were forged to it; and where the complaining surety intrusts the bond to the president of the bank as an escrow, not to be delivered to the State until these sureties execute it, but the president does deliver it to the governor who is the obligee, the complaining surety is liable thereon.<sup>1</sup>

§ 281. **Same Subject—Erasure of Name of one Surety.**—But where a bond, signed by a number of sureties, had been confided to the principal for delivery, and he before delivery, erased the name of one of the sureties without the consent of the others, and then delivered the bond, it was held that not only were those sureties released who had signed after the one whose name was erased, but those who had signed it before were released also.<sup>2</sup>

#### c. Liability of Sureties for Defaults of Principal.

§ 282. **Surety's Liability is strictissimi Juris.**—The contract of sureties upon an official bond is subject only to the strictest interpretation. They undertake, in the language of Judge COOLEY, "for nothing which is not within the letter of their contract. The obligation is *strictissimi juris*; and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent."<sup>3</sup>

<sup>1</sup> Mathis v. Morgan, 72 Ga. 517, 53 Am. Rep. 847.

<sup>2</sup> State v. Craig, 58 Iowa 238, citing "as tending to support" the ruling: Smith v. United States, 2 Wall. (U. S.) 219; McCramer v. Thompson, 21 Iowa 244; Dickerman v. Miner, 48 Iowa 508.

<sup>3</sup> Detroit Savings Bank v. Zeigler,

49 Mich. 157, 43 Am. Rep. 456, citing Paw Paw v. Eggleston, 35 Mich. 36, 40; Detroit v. Leadbeater, 29 Mich. 24; Johnston v. Kimball, 39 Mich. 187, 33 Am. Rep. 372; Bullock v. Taylor, 39 Mich. 187, 33 Am. Rep. 356; United States v. Boyd, 15 Pet (U. S.) 187; State v. Cutting, 2 Ohio St. 1; McCluskey v. Cromwell, 11 N. Y.

§ 283. **Extends to official Acts only.**—So the liability of the sureties is to be limited to the *official acts* of the principal only,<sup>1</sup> and is by no means an undertaking against every act that he may chance to commit. As is said in a leading case, “The sureties do not bind themselves to protect the public against every act of their principal, nor do they become his sureties to keep the peace.” So it is said “It is an official act, a failure to perform an official duty or performing it in an improper manner, which comes within the scope of the surety’s undertaking.”<sup>2</sup> And again, “For acts not within the line of official duty and authority, not under color of office, (the officer) may incur personal not official responsibility; and in that personal responsibility, the sureties on his official bond are not involved.”<sup>3</sup>

§ 284. **Same Subject—Distinction between Acts done Colore Officii and Virtute Officii.**—Acts done by virtue and authority of the office—*virtute officii*,—are clearly to be regarded as official acts, and render the sureties responsible; but acts done merely under color of the office,—*colore officii*,—do not stand upon so clear a ground. The distinction between the two has been stated thus: “Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do

598; *Urmston v. State*, 73 Ind. 175.

Their liability will not be extended by construction or doubtful interpretation. *Taylor v. Parker*, 48 Wis. 78. “Liability of sureties is not to be extended by construction, but is to be limited to the terms of the obligation, considered according to their true intent and meaning.” *State v. Conover*, 4 Dutch (N. J.) 324, 78 Am. Dec. 54.

See also to like effect *Clark v. Lamb*, 78 Ala. 406; *Heidenheimer v. Brent*, 59 Tex. 538.

<sup>1</sup> *State v. Conover*, 4 Dutch. (N. J.) 324, 78 Am. Dec. 54; *Gerber v. Ack-*

*ley*, 37 Wis. 43, 19 Am. Rep. 751; *State v. Davis*, 88 Mo. 585; *Clark v. Lamb*, 78 Ala. 406; *Heidenheimer v. Brent*, 59 Tex. 538; *People v. Lucas*, 93 N. Y. 585.

<sup>2</sup> *State v. Conover*, 4 Dutch. (N. J.) 324, 78 Am. Dec. 54.

<sup>3</sup> *COLE, J.* in *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751.

<sup>4</sup> *McKee v. Griffin*, 66 Ala. 311; *Coleman v. Ormond*, 60 Ala. 336; *Brewer v. King*, 63 Ala. 511; *Morrow v. Wood*, 56 Ala. 1; *Kelly v. Moore*, 51 Ala. 364; *Moore v. Madison Co.* 38 Ala. 670; *McElhaney v. Gilleland*, 30 Ala. 163.

them."<sup>1</sup> For acts of the latter kind, it is held in many States that the sureties are not responsible.<sup>2</sup>

This question has been most frequently raised, and is well illustrated, in cases in which it has been sought to hold liable the sureties of a sheriff, marshal, constable or other executive officer who has seized, upon process against one person, the goods or other property of another, or who has levied upon property which was exempt from such seizure.

Upon the one hand it is said that the officer acts officially, and hence binds his sureties, only when acting in pursuance and by virtue of his writ, and as his writ justifies only the seizure of the property of the defendant therein named, not exempt from execution, his seizure of the goods of a stranger, or his seizure of exempt property is a purely voluntary and unauthorized trespass which neither his writ nor his official character can justify, and which imposes upon the officer merely personal and not official responsibility.<sup>3</sup>

On the other hand it is said that the undertaking of the sureties is that their principal will well and faithfully execute the duties of his office, and that he can not be deemed to have done so when he seizes the property of a stranger or levies upon property exempt from execution. There is, therefore, such a breach of the condition of the bond as renders the sureties liable.<sup>4</sup>

<sup>1</sup> *People v. Schuyler*, 4 N. Y. 187; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751.

<sup>2</sup> See cases cited in following note.

<sup>3</sup> *State v. Conover*, 4 Dutch. (N. J.) 224, 78 Am. Dec. 54; *State v. Long*, 8 Ired. (N. C.) 415; *State v. Brown*, 11 Ired. 141; *Gerber v. Ackley*, 32 Wis. 233, 37 Wis. 43, 19 Am. Rep. 751; *Governor v. Hancock*, 2 Ala. 728; *McElhaney v. Gilleland*, 30 Ala. 183; *Brown v. Mosely*, 11 Smedes & M. (Miss.) 354; *Jenkins v. Lemonds*, 29 Ind. 294; *Carey v. State*, 34 Ind. 105.

<sup>4</sup> *Carmack v. Commonwealth*, 5 Bin. (Penn.) 184; *Brunott v. McKee*, 6 Watts & S. (Penn.) 513; *Archer v. Noble*, 3 Greenl. (Me.) 418; *Harris v.*

*Hanson*, 2 Fairf. (Me.) 241; *Greenfield v. Wilson*, 13 Gray, (Mass.) 384; *Tracy v. Goodwin*, 5 Allen (Mass.) 409; *State v. Jennings*, 4 Ohio St. 418; *Sangster v. Commonwealth*, 17 Gratt. (Va.) 124; *Commonwealth v. Stockton*, 5 T. B. Mon. (Ky.) 192; *Jewell v. Mills*, 3 Bush (Ky.) 63; *State v. Moore*, 19 Mo. 369, 61 Am. Dec. 563; *State v. Fitzpatrick*, 64 Mo. 135; *Charles v. Haskins*, 11 Iowa 329, 77 Am. Dec. 148; *Turner v. Killian*, 12 Neb. 580; *Holliman v. Carroll*, 27 Tex. 23, 84 Am. Dec. 606; *Van Pelt v. Littler*, 14 Cal. 194; *United States v. Hine*, 3 McAr. (D. C.) 27; *Lammon v. Feuster*, 111 U. S. 17.

The non-liability of the sureties in such cases is maintained in New Jersey,<sup>1</sup> North Carolina,<sup>2</sup> Texas,<sup>3</sup> and Wisconsin,<sup>4</sup> and perhaps in Alabama,<sup>5</sup> Indiana<sup>6</sup> and Mississippi.<sup>7</sup>

But the rule of liability is not only supported by the soundest reasons of policy, but is maintained by the great preponderance of authority, being adopted in California,<sup>8</sup> Iowa,<sup>9</sup> Illinois,<sup>10</sup> Kentucky,<sup>11</sup> Maine,<sup>12</sup> Massachusetts,<sup>13</sup> Michigan,<sup>14</sup> Missouri,<sup>15</sup> Nebraska,<sup>16</sup> New York,<sup>17</sup> Ohio,<sup>18</sup> Pennsylvania,<sup>19</sup> Texas,<sup>20</sup> Virginia,<sup>21</sup> Washington,<sup>22</sup> the District of Columbia,<sup>23</sup> and the Supreme Court of the United States.<sup>24</sup>

§ 285. Same Subject—Sureties for one Office not liable for Defaults in another.—Sureties who have undertaken to become responsible for the defaults of their principal in respect to a particular office are not liable for the defaults of the same principal in his character as the incumbent of another and independent

<sup>1</sup> State v. Conover, 4 Dutch. (N. J.) 224. 78 Am. Dec. 54.

<sup>2</sup> State v. Long, 8 Ired. (N. C.) 415; State v. Brown, 11 Ired. 141.

<sup>3</sup> Heidenheimer v. Brent, 59 Tex. 533.

<sup>4</sup> Gerber v. Ackley, 83 Wis. 233; Gerber v. Ackley, 37 Wis. 43, 19 Am. Rep. 751.

<sup>5</sup> See Governor v. Hancock, 2 Ala. 728; McElhaney v. Gilleland, 30 Ala. 183; McKee v. Griffin, 66 Ala. 211.

<sup>6</sup> See Jenkins v. Lemonds, 29 Ind. 294; Carey v. State, 34 Ind. 105.

<sup>7</sup> See Brown v. Mosley, 11 Smedes & M. (Miss.) 354.

<sup>8</sup> Van Pelt v. Littler, 14 Cal. 194.

<sup>9</sup> Charles v. Haskins, 11 Iowa 329, 77 Am. Dec. 148.

<sup>10</sup> Horan v. People, 10 Ill. App. 21.

<sup>11</sup> Commonwealth v. Stockton, 5 T. B. Mon. (Ky.) 192; Jewell v. Mills, 3 Bush (Ky.) 62.

<sup>12</sup> Archer v. Noble, 3 Greenl. (Me.) 418; Harris v. Hanson, 2 Fairf. (Me.) 241.

<sup>13</sup> Turner v. Sisson, 187 Mass. 191; Greenfield v. Wilson, 13 Gray (Mass.) 384; Tracy v. Goodwin, 5 Allen (Mass.) 409.

<sup>14</sup> People v. Mersereau, — Mich. —, 42 N. W. Rep. 158.

<sup>15</sup> State v. Moore, 19 Mo. 369, 61 Am. Dec. 563.

<sup>16</sup> Turner v. Killian, 12 Neb. 580; Noble v. Himeo, 12 Neb. 193.

<sup>17</sup> People v. Schuyler, 4 N. Y. 173; Mayor v. Sibbena, 3 Abb. App. 266; Cumming v. Brown, 43 N. Y. 514. See People v. Lucas, 98 N. Y. 585, distinguishing People v. Schuyler.

<sup>18</sup> State v. Jennings, 4 Ohio St. 418. See also Hubbard v. Elden, 43 Ohio St. 380.

<sup>19</sup> Carmack v. Commonwealth, 5 Binn. (Penn.) 184; Brunott v. McKee, 6 Watts & Serg. (Penn.) 513.

<sup>20</sup> Holliman v. Carroll, 27 Tex. 33, 84 Am. Dec. 606, but see Heidenheimer v. Brent, 59 Tex. 533.

<sup>21</sup> Sangster v. Commonwealth, 17 Gratt. (Va.) 124.

<sup>22</sup> Mace v. Gaddis, — Wash. —, 13 Pac. Rep. 545.

<sup>23</sup> United States v. Hine, 3 McAr. (D. C.) 27.

<sup>24</sup> Lammon v. Feusler, 111 U. S. 17.



office,<sup>1</sup> unless the duties of the second office were by law then made a part of the regular duties of the first,<sup>2</sup> or unless the duties of the second office were such as the officer, as incumbent of the first office, might naturally and legally be called upon to perform.<sup>3</sup>

Thus the sureties of a clerk of court are not responsible for the defaults of the same person while acting as a receiver,<sup>4</sup> nor of a register in chancery while officiating as probate judge,<sup>5</sup> nor of a sheriff while acting as trustee.<sup>6</sup>

But if the duties of the second office are, *ex officio*, part of the duties of the first,<sup>7</sup> or if the law requires the incumbent of the first to perform the duties of the second,<sup>8</sup> the sureties on the bond for the first office, will, unless such a liability is expressly excluded, be liable for defaults in the performance of the second.

§ 286. Sureties bound for Default occurring during Term only.—Sureties upon the bond of an officer elected or appointed for a fixed or ascertained term, are, unless they have expressly assumed a greater responsibility, bound only for such defaults as may occur during the term for which they became sureties.<sup>9</sup>

This is clearly so where the bond itself specifies the period. If the bond is silent as to the length of the term, the statute fixing the length is to be regarded and read as a part of the contract.<sup>10</sup>

<sup>1</sup> State v. Odom, 86 N. C. 432; Syme v. Bunting, 91 N. C. 48; Kerr v. Brandon, 84 N. C. 128; Wilmington v. Nutt, 80 N. C. 265; State v. Davis, 88 Mo. 585; Waters v. Carroll, 9 Yerg. (Tenn.) 102; Williams v. Bowman, 8 Head. (Tenn.) 631; State v. Blakemore, 7 Heisk. (Tenn.) 638; Hammer v. Kaufman, 39 Ill. 87.

<sup>2</sup> Satterfield v. People, 104 Ill. 448; Van Valkenbergh v. Paterson, 47 N. J. L. 146.

<sup>3</sup> Hubbard v. Elden, 48 Ohio St. 380.

<sup>4</sup> State v. Odom, 86 N. C. 432; Syme v. Bunting, 91 N. C. 48.

<sup>5</sup> McKee v. Griffin, 66 Ala. 211.

<sup>6</sup> State v. Davis, 88 Mo. 585.

<sup>7</sup> Van Valkenbergh v. Patterson, 47 N. J. L. 146.

<sup>8</sup> Satterfield v. People, 104 Ill. 448.

<sup>9</sup> People v. Toomey, 123 Ill. 308, 18

N. East Rep. 521; Rogers v. State, 99 Ind. 218; Yost v. State 80 Ind. 350; Ohning v. Evansville, 66 Ind. 59; Stern v. People, 96 Ill. 475; Potter v. Board of Trustees, 11 Ill. App. 280; Van Sickel v. Buffalo County, 18 Neb. 103, 42 Am. Rep. 753; Inhabitants v. Stanley, 47 Me. 515, 74 Am. Dec. 501; Inhabitants v. Randall, 105 Mass. 295, 7 Am. Rep. 519; Mahaska County v. Ingalls, 16 Iowa 81; Bessinger v. Dickerson, 20 Iowa 260; Lowry v. State, 64 Ind. 421; State v. Hauser, 63 Ind. 155; Farrar v. United States, 5 Pet. (U. S.) 373; United States v. Boyd, 15 Pet. 187; United States v. Linn, 1 How. (U. S.) 104; Myers v. United States, 1 McLean 492.

<sup>10</sup> People v. Toomey, 123 Ill. 308, 18 N. E. Rep. 521.

The sureties, therefore, can be held responsible neither for those defaults of the officer which occurred before they became sureties,<sup>1</sup> nor for those happening after the term for which they agreed to be bound has expired.<sup>2</sup>

Where the office is, by the law or usage by which it is created, an annual one, the bond covers only the official acts of the year for which it was given.<sup>3</sup>

And even though the statute, fixing the term, declares that the officer shall hold for a given term, and until his successor is elected, the sureties, if liable at all after the expiration of that term, can be held liable for such defaults only as occur within a reasonable time after the expiration of the term within which such successor might have been chosen although he may not, in fact, have been chosen.<sup>4</sup>

But the fact that the bond contains the clause which, in terms, extends the liability until another is chosen, does not, like the statutory clause of the same import, extend the legal liability beyond the expiration of the year.<sup>5</sup>

The condition for the appointment of "another" officer is satisfied by the re-appointment of the same officer, and the sure-

<sup>1</sup> *State v. Alsop*, 91 Mo. 172, 4 S. W. Rep. 81; *Webster County v. Hutchinson*, 60 Iowa 721; *State v. Orr*, 12 Lea (Tenn.) 725.

<sup>2</sup> *States v. Powell*, 40 La. Ann. 241, 4 South. Rep. 447; *Mayor v. Crowell*, 40 N. J. L. 207, 29 Am. Rep. 234; *Mayor v. Horn*, 2 Harr. (Del.) 190; *Commissioners v. Greenwood*, 1 Desaus. Eq. 450; *Chelmsford v. Demarest*, 7 Gray (Mass.) 1; *Leadley v. Evans*, 2 Bing. 83; *Liverpool Co. v. Harpley*, 6 East 507; *Peppin v. Cooper*, 3 B. & Ald. 481; *Bigelow v. Bridge*, 8 Mass. 275; *People v. Toomey*, 25 Ill. App. 46; *Lauderdale v. Alford*, 65 Miss. 68.

<sup>3</sup> *Norridgewock v. Hale*, 80 Me. 363, 14 Atl. Rep. 943; *Arlington v. Merriks*, 2 Saund. 411; *Bigelow v. Bridge*, 8 Mass. 275.

<sup>4</sup> *County of Scott v. Ring*, 29 Minn.

898; *Mayor of Rahway v. Crowell*, 11 Vroom (N. J.) 207, 29 Am. Rep. 224; *Mutual Loan Assn. v. Price*, 16 Fla. 204, 26 Am. Rep. 708; *State Treasurer v. Mann*, 84 Vt. 371, 80 Am. Dec. 688; *Wapello County v. Bigham*, 10 Iowa 39, 74 Am. Dec. 370; *Welch v. Seymour*, 28 Conn. 387; *Mayor of Wilmington v. Horn*, 2 Harr. (Del.) 190; *Dover v. Twombly*, 42 N. H. 59; *Bigelow v. Bridge*, 8 Mass. 275; *Chelmsford County v. Demarest*, 7 Gray (Mass.) 1.

*Contra*, see BERRY, J., in *County of Scott v. Ring*, 29 Minn. 398; *Dumphy v. Whipple*, 25 Mich. 10.

<sup>5</sup> *Norridgewock v. Hale*, 80 Me. 363, 14 Atl. Rep. 943; *Amherst Bank v. Root*, 2 Metc. (Mass.) 542; *Chelmsford Co. v. Demarest*, 7 Gray (Mass.) 4; *Dover v. Twombly*, 42 N. H. 50.

ties upon his bond for the first term are not bound after his re-appointment.<sup>1</sup>

§ 287. **Same Subject—Sureties for second Term.**—In accordance with the principles laid down in the foregoing section, it is held that sureties, upon the bond of an officer continued in office for a second or other successive term, are not liable for defaults which occurred during a preceding term, or for moneys which should have been in his hands at the beginning of his second term but which he had appropriated to his own use during his first term,<sup>2</sup> unless, of course, they were also his sureties for that term; and it is always open for them to show that the default complained of did, in fact, occur during a previous term for which they were not sureties.<sup>3</sup> In such a case the sureties for the previous term are alone liable.<sup>4</sup>

In the absence, however, of any showing as to the time when the default actually occurred, it will be presumed that it took place during the last term, and the sureties for that term will be liable.<sup>5</sup> The burden of overcoming this presumption is upon the sureties.<sup>6</sup>

Where the officer has used moneys coming into his hands offic-

<sup>1</sup> *Citizens' Loan Association v. Nugent*, 11 Vroom. (N. J.) 215, 29 Am. Rep. 230.

<sup>2</sup> *Rogers v. State*, 99 Ind. 218; *Stern v. People*, 96 Ill. 475; *County of Scott v. Ring*, 39 Minn. 398; *Yoakley v. King*, 10 Lea. (Tenn.) 67; *Pape v. People*, 19 Ill. App. 24; *Potter v. Trustees*, 11 Ill. App. 280; *Webster County v. Hutchinson*, 60 Iowa, 721; *State v. Orr*, 12 Lea. (Tenn.) 725; *Pine County v. Willard*, 39 Minn. 125, 39 N. W. Rep. 71; *Crawn v. Commonwealth*, 84 Va. 282, 4 S. E. Rep. 721; *State v. Churchill*, 48 Ark. 426, 3 S. W. Rep. 352; *State v. Alsop*, 91 Mo. 172, 4 S. W. Rep. 81; *Heppe v. Johnson*, 73 Cal. 265, 14 Pac. Rep. 833; *State v. Finn*, 28 Mo. App. 290; *Detroit v. Weber*, 39 Mich. 24; *Paw Paw v. Eggleston*, 25 Mich. 36; *Vivian v. Otis*, 24 Wis. 518, 1 Am. Rep. 199;

*Inhabitants v. Randall*, 105 Mass. 295, 7 Am. Rep. 519; *Bissell v. Saxton*, 66 N. Y. 55, a. o. 77 N. Y. 191; *Thompson v. McGregor*, 81 N. Y. 593; *Coons v. People*, 76 Ill. 383.

<sup>3</sup> *Webster County v. Hutchinson*, 60 Iowa, 721; *Pine County v. Willard*, 39 Minn. 125, 39 N. W. Rep. 71; *Stern v. People*, 96 Ill. 475.

<sup>4</sup> *Coons v. People*, 76 Ill. 383.

<sup>5</sup> *Heppe v. Johnson*, 39 Cal. 265, 14 Pac. Rep. 833; *Pape v. People*, 19 Ill. App. 24; *Pine County v. Willard*, 39 Minn. 125, 39 N. W. Rep. 71; *Kelley v. State*, 25 Ohio St. 567.

But see *Trustees v. Smith*, 63 Ill. 181.

<sup>6</sup> *Pine County v. Willard*, 39 Minn. 125, 39 N. W. Rep. 71; *Kelly v. State*, 25 Ohio St. 567; *Bruce v. United States*, 17 How. (U. S.) 437; *Hetten v. Lane*, 43 Tex. 279.

ially during the second or other subsequent term, to make good a default committed by him in the first or other prior term, the sureties upon his bond for the second or other subsequent term will be liable,<sup>1</sup> and the fact that the public officers, charged with the duty, failed to require the officer to account at the close of the prior term,<sup>2</sup> or extended the time for such accounting,<sup>3</sup> or that, with knowledge of his default, they accepted the bond for the subsequent term,<sup>4</sup> will not relieve the sureties for the subsequent term.

But while the sureties for a subsequent term are not liable for defaults or misappropriations occurring before their term, they are of course liable for all official defaults occurring during the term, and they are thus liable for any defalcation in the amount of funds in the hands of their principal at the commencement of their term and carried forward from the prior term.<sup>5</sup>

§ 288. *Same Subject—How when Time of Default can not be ascertained.*—Where, however, it cannot be ascertained in which of several successive terms the deficiency arose, equity, it is said, will apportion it ratably upon all of the several bonds.<sup>6</sup>

§ 289. *Same Subject—How far Officer's Accounts conclusive upon Sureties.*—It therefore becomes material to inquire how far the sureties upon an official bond are bound by the accounts, statements and reports of the officer as to the amount in his hands during the term.

It is held in a number of cases that such accounts, statements and reports are not only conclusive upon the officer, but upon

<sup>1</sup> *Pine County v. Willard*, 39 Minn. 129, 39 N.W. Rep. 71; *Crawn v. Commonwealth*, 84 Va. 282, 4 S. E. Rep. 721; *Gwynne v. Burnell*, 7 Clark. & F. 572; *Inhabitants v. Bell*, 9 Metc. (Mass.) 499; *Cook v. State*, 18 Ind. 154; *Rogers v. State*, 99 Ind. 218.

<sup>2</sup> *Crawn v. Commonwealth*, 84 Va. 282, 4 S. E. Rep. 721; *Paw Paw v. Eggleston*, 25 Mich. 36.

<sup>3</sup> *Crawn v. Commonwealth*, 84 Va. 282, 4 S. E. Rep. 721.

<sup>4</sup> *Pine County v. Willard*, 39 Minn.

125, 39 N. W. Rep. 71; *Crawn v. Commonwealth*, 84 Va. 282, 4 S. E. Rep. 721.

<sup>5</sup> *Board of Education v. Fonda*, 77 N. Y. 350; *United States v. Boyd*, 15 Peters, (U. S.) 187.

*Contra*, *Sidner v. Alexander*, 31 Ohio St. 378.

See cases cited in following sections.

<sup>6</sup> *State v. Churchill*, 48 Ark. 426; *Phippsburg v. Dickinson*, 78 Me. 457.

his sureties as well, and that they are estopped to assert or show that he had not in his hands the amount reported by him.<sup>1</sup>

But other cases hold, and it is believed with better reason, that while such accounts, statements and reports may be *prima facie* evidence of the officer's liability, they are not conclusive upon his sureties, and that the latter may show, if it be the fact, that he had not actually in his hands the amount he reported to be held by him.<sup>2</sup> They may thus show that defalcations apparently taking place within their term actually occurred during a prior term.

§ 290. **Same Subject—How far Judgment against Principal is conclusive upon Sureties.**—Much uncertainty exists also as to how far the sureties upon an official bond are concluded by a judgment against their principal for a breach of the duty secured by the bond.

Where the action is brought upon the bond itself against the

<sup>1</sup> *Baker v. Preston*, 1 Gilm. (Va.) 285; (criticised in later cases, *Munford v. Overseers*, 2 Rand. 813; *Jacobs v. Hill*, 2 Leigh 898; *Craddock v. Turner*, 6 Leigh 116; *Crawford v. Turk*, 24 Gratt. 176); *State v. Grammer*, 29 Ind. 530; (overruled *Lowry v. State*, 64 Ind. 421) *Morley v. Metamora*, 78 Ill. 394, 20 Am. Rep. 266; *Boone County v. Jones*, 54 Iowa, 699, 37 Am. Rep. 229; *City of Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *McCabe v. Raney*, 32 Ind. 309; *Pinkstaff v. People*, 59 Ill. 148; *Roper v. Lodge*, 91 Ill. 518, 33 Am. Rep. 60; *Territory v. Cook*. — *Ariz.* —, 17 Pac. Rep. 10.

<sup>2</sup> *Blissell v. Saxton*, 66 N. Y. 55; *Van Zickel v. Buffalo County*, 13 Neb. 103, 42 Am. Rep. 753; *State v. Rhoades*, 6 Nev. 352; *State v. Newton*, 33 Ark. 276; *United States v. Boyd*, 5 How. (U. S.) 29; *United States v. Eckford*, 1 How. (U. S.) 250; *Nolley v. Callaway*, 11 Mo. 447; *State v. Smith*, 26 Mo. 226, 72 Am. Dec. 204;

*Hatch v. Attleborough*, 97 Mass. 533; *Inhabitants v. Randall*, 105 Mass. 295, 7 Am. Rep. 519; *Vivian v. Otis*, 24 Wis. 518, 1 Am. Rep. 199; *State v. Fullenwider*, 4 Ired. (N. C.) 364; *Broad v. Paris*, 66 Tex. 119; *Mann v. Yazoo*, 31 Miss. 574; *Supervisors v. Bristol*, 99 N. Y. 316; *Lowry v. State*, 64 Ind. 421; *Ohning v. Evansville*, 66 Ind. 59; *State v. Haynes*, 79 Ind. 294; *Heagy v. State*, 85 Ind. 260; *Lipscomb v. Postell*, 38 Miss. 477, 77 Am. Dec. 651; *Governor v. Sutton*, 4 Dev. & B. (N. C.) 484.

While books and entries made by a county treasurer, or his agent, are *prima facie* evidence against him and his sureties, yet entries made by the agent after the termination of his agency by the death of the treasurer, are not binding on him or his sureties, and are not admissible in evidence against them. *Coleman v. Pike County*, 33 Ala. 326, 3 Am. St. Rep. 746.

principal and his sureties jointly, they are, of course, bound by the judgment.

But it is where a judgment has first been obtained in an action against the principal alone, and this judgment is afterwards offered, in an action against the sureties upon the bond, as evidence of the fact and extent of their liability, that the question arises.

A distinction is made between cases where the sureties undertake generally that their principal shall faithfully perform the duties of a certain office, and those cases where the undertaking is that the principal shall do a specific act, as to pay a judgment if recovered, or to account before some court or tribunal as in the case of executors, administrators, guardians, receivers and the like. In these latter cases, it is usually held that the judgment recovered,<sup>1</sup> or the order, judgment or decree fixing the amount to be accounted for, is conclusive upon the sureties.<sup>2</sup>

<sup>1</sup> Thus in *Pico v. Webster*, 14 Cal. 202, 78 Am. Dec. 647, the court, per BALDWIN, J. say: There can be no doubt that where a surety undertakes for the principal that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact. *Train v. Gold*, 5 Pick. (Mass.) 390; *Lincoln v. Blanchard*, 17 Vt. 464. See also *Riddle v. Baker*, 18 Cal. 295. It is upon this ground that the liability of bail is fixed absolutely by the judgment against the principal. But this rule rests upon the terms of the contract."

<sup>2</sup> In the case of administrators, sureties are bound, in the absence of

fraud, by decree against principal. *Storall v. Banks*, 10 Wall. (U. S.) 583; *State v. Holt*, 27 Mo. 340, 72 Am. Dec. 273; *Heard v. Lodge*, 20 Pick. (Mass) 53, 32 Am. Dec. 197; *Ralston v. Wood*, 15 Ill. 159, 53 Am. Dec. 604; *Garber v. Commonwealth*, 7 Penn. St. 265; *Salzer v. State*, 5 Port. (Ind.) 203; *Hobbs v. Middleton*, 1 J. J. Marsh. (Ky.) 179; *Irwin v. Backus*, 25 Cal. 223.

But see *Armistead v. Harramond*, 4 Hawks (N. C.) 341; *Iglehart v. State*, 2 Gill & J. (Md.) 235; *Seat v. Cannon*, 1 Humph. (Tenn.) 471; *Ordinary v. Wallace*, 1 Rich. (S. C.) 507.

In the case of receivers, see *Ball v. Chancellor*, 47 N. J. L. 125. "Nor does it make any difference," says the court in this case, "whether the duty of the principal to make such accounting be expressly stipulated for in the instrument composing the suretyship, or such obligation is merely to be necessarily inferred from the nature of the business in question."

In the former cases, however, the authorities range from the one extreme that the judgment is not admissible at all against the sureties,<sup>1</sup> or at least if they were not notified of the suit and given an opportunity to defend,<sup>2</sup> to the other extreme that such judgment is conclusive of the fact and amount of the sureties' liability.<sup>3</sup>

But the true rule seems to be that laid down, in an early case in Massachusetts, by Chief Justice SHAW, that "When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for the failure of the performance of such duty, if not conclusive, is *prima facie* evidence, in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is *prima facie* evidence, to stand until impeached or controlled, in whole or in part, by countervailing proofs."<sup>4</sup>

In North Carolina, the judgment is, by statute, made presumptive only.<sup>5</sup>

<sup>1</sup> Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647, citing McKellar v. Howell, 4 Hawks (N. C.) 34; Munford v. Overseers, 2 Rand. (Va.) 313; Beal v. Beck, 8 Har & M. (Md.) 242.

<sup>2</sup> Douglass v. Howland, 24 Wend. (N. Y.) 35; Jackson v. Griswold, 4 Hill (N. Y.) 522; Slee v. Bloom, 20 Johns. (N. Y.) 669, 10 Am. Dec. 273; Carmichael v. Governor, 8 How. (Miss.) 236; Carmack v. Commonwealth, 5 Binn. (Penn.) 184.

<sup>3</sup> Fay v. Ames, 44 Barb. (N. Y.) 327; Masser v. Strickland, 17 Serg & R. (Penn.) 354, 17 Am. Dec. 668; Eagles v. Kern, 5 Whart. (Penn.) 144; Evans v. Commonwealth, 8 Watts. (Penn.) 399; Musselman v. Commonwealth, 7 Penn. St. 240; McMicken v. Commonwealth, 58 Penn. St. 231; Giltinan v. Strong, 64 Penn. St. 242; Commonwealth v. Smith, 4 Phila. 51; Dane v. Gilmore, 51 Me. 544; Tracy v. Goodwin, 5 Allen, (Mass.) 409.

<sup>4</sup> City of Lowell v. Parker, 10 Metc. (Mass.) 309, 315, 43 Am. Dec. 436. To same effect, Stephens v. Shafer, 48 Wis. 54, 38 Am. Rep. 793; Graves v. Buckley, 25 Kans. 249, 37 Am. Rep. 249; Fay v. Edmiston, 25 Kans. 439, 37 Am. Rep. 252, n.; Charles v. Haskins, 14 Iowa 471, 83 Am. Dec. 378; Crawford v. Word, 7 Ga. 445; Taylor v. Johnson, 17 Ga. 521; Mul-len v. Scott, 9 La. Ann. 178; Treasurer v. Temples, 2 Bail. (S. C.) 362; Atkins v. Baily, 9 Yerg. (Tenn.) 111; People v. Mersereau, — Mich. —, 43 N. W. Rep. 153.

As to the Ohio rule, see State v. Colerick, 3 Ohio 487; State v. Jennings, 14 Ohio St. 78.

Subsequently to City of Lowell v. Parker, *supra*, the judgment was held to be conclusive evidence in Massachusetts: Tracy v. Goodwin, 5 Allen 409.

<sup>5</sup> State v. Smith, 95 N. C. 396;

§ 291. **Same Subject—Appropriation of Payments.**—The sureties for each term being thus liable for those defaults or defalcations only which occur during the term for which they became security, it is evidently just and equitable that the sureties for any term should have any moneys properly received on account of that term applied to the reduction of their liability.<sup>1</sup>

Thus where a collecting officer, who is in default for a prior term, properly pays over in a subsequent term, according to his bond, money received during that term, the government officers cannot, even with the consent of the collector, apply the money so received upon the defalcation of the previous term, and by thus creating an apparent deficit at the end of the subsequent term, hold the sureties for that term liable for it.<sup>2</sup>

So where a county treasurer, having served two successive terms, was a defaulter at the end of each, and afterwards made payments upon the aggregate without any designation as to their application by anyone, the money so paid being derived from two sources: 1. From loans and investments of the money for which he was in default, and 2. From sources having no connection with the office, it was held, in a suit upon the first bond, that payments from funds of the first class should be appropriated to the defalcations of the respective terms from the moneys of which the loans and investments were made, in proportion to the amounts appropriated from each. As to the moneys of the second class, however, the court held that, inasmuch as the sureties upon each bond were equally solvent, the application should be made to the debt of the first term, as the older debt, in accord-

Moore v. Alexander, — N. C. —, 1 S. E. Rep. 536.

<sup>1</sup> United States v. Irving, 1 How. (U. S.) 250; Rogers v. State, 99 Ind. 218; Pine County v. Willard, 39 Minn. 135, 39 N. W. Rep. 71; State v. Alsop, 91 Mo. 172, 4 S. W. Rep. 81; State v. Smith, 26 Mo. 226, 72 Am. Dec. 204.

<sup>2</sup> United States v. Irving, 1 How. (U. S.) 250. And to the same effect, see United States v. January, 7 Cranch (U. S.) 572; Jones v. United States, 7 How. (U. S.) 688; Pickering v. Day,

8 Houst. (Del.) 474, 95 Am. Dec. 291; Boring v. Williams, 17 Ala. 525; Porter v. Stanley, 47 Me. 518; Myers v. United States, 1 McLean, 495; Postmaster-General v. Norvell, Gilpin 106; State v. Middleton, 57 Tex. 185.

But in Postmaster-General v. Furber, 4 Mason 333, and United States v. Wardwell, 5 Mason 82, J. STORY questions the effect of the decision in United States v. January, 7 Cranch 572, *supra*, and to the case in 5 Mason appends a long note in explanation of his views.



ance with the rule laid down in an earlier case,<sup>1</sup> that "When a person owes upon several distinct accounts, he has a right to direct his payments to be applied to either, as he chooses; but if he pays generally, then the creditor may apply as he elects; and if neither makes a specific application, then the court will usually make the application, first to the most precarious security, or to the oldest debt." \*

§ 292. **Same Subject.—The contrary View.**—But, on the other hand, it has been said in a Missouri case:<sup>2</sup> "Although the law, when it falls to its lot to appropriate payments, will not suffer the revenue received under one term to be applied to the satisfaction of a defalcation incurred under another term, when there is a different set of securities for each term, yet if the officer himself will make the misappropriation, and the money is received in good faith by the party to whom the officer is indebted, such misappropriation cannot be avoided, and it will be binding on the sureties for the term during which it was collected." And "if the officer does not make the application of payment, the creditor may. If it is shown that the creditor has made application of the payment in good faith towards the extinguishment of the prior indebtedness, the sureties on the last bond will be bound by such application. It is only when the law makes the application of the payments that the second set of sureties is entitled to the sums that may be shown to have been received under their bond." \*

In another case it is said that, in cases of successive bonds with different sureties, the creditor, *if he be informed of the sources from which the money came*, cannot apply it upon a prior debt, even with the consent or by the direction of the principal debtor.<sup>3</sup>

<sup>1</sup> King v. Andrews, 80 Ind. 429.

<sup>2</sup> Rogers v. State, 99 Ind. 218. See also Frost v. Mixsell, 88 N. J. Eq. 586, 602.

<sup>3</sup> State v. Smith, 26 Mo. 226, 72 Am. Dec. 204, by SCOTT, J.

<sup>4</sup> Citing Seymour v. Van Slyck, 8 Wend. (N. Y.) 403.

<sup>5</sup> Chapman v. Commonwealth, 25 Gratt. (Va.) 721, 751. In this case

the court approve the rule laid down by Judge STORY in *Postmaster-General v. Furber* (1827), 4 Mason 383, and *United States v. Wardwell* (1828), 5 Mason 82, and lay down the following rules:

"A payment by a debtor who owes several debts to a creditor, is to be applied to one or the other of the debts: First, as the debtor may direct at or

But the weight of authority seems to sustain the rule, laid down at the beginning of the section, that the general principles governing the application of payments between private individuals do not apply between collecting officers and their sureties on the one hand and the accounting officers of the government on the other, and that neither the collector himself nor the accounting officers can so apply the funds as to affect the right of the successive sets of sureties to have the funds received on account of any year or term applied to that year or term.<sup>1</sup>

Where the officer serves for two successive terms, it is held

before the time of making such payment; and such direction may be given expressly or by implication. Secondly, if the debtor give no such direction, then the creditor may make the application, according to his pleasure; and he may make it, either at the time of such payment or afterwards, before the commencement of any controversy on the subject; though after he has once made the application, he can not change it to another without the consent of all other persons concerned. Such application by a creditor may also be made either expressly or by implication. If he enter the debts and credits in a general account, as they occur, this will be considered, in the absence of any evidence to the contrary, as a general application of the credits to the debits in the order of time in which the latter occur, thus paying first the antecedent debts. Thirdly, if neither the debtor nor the creditor make the application, then the law will make it, according to the circumstances of each particular case; and if there be no other controlling circumstance, the application will be made according to the order of time, paying first the oldest debt. But if the debts be due by a collector or other receiver of money under bonds with different sets of sureties, then

the law will so apply the payments, if possible, as that the money collected under one bond shall be applied to the relief of the sureties in that bond respectively. And the creditor in such a case, if he be informed as to the source from which the money with which a payment may have been made was derived can not apply it otherwise, even with the consent or by the direction of the principal debtor."

*Chapman v. Commonwealth* is approved in *Crawn v. Commonwealth*, 84 Va. 282, 4 S. E. Rep. 721.

See also *United States v. Nicholl*, 12 Wheat. (U. S.) 505; *Boody v. United States*, 1 Woodb. & M. 150; *Inhabitants v. Shaver*, 50 Me. 89, 79 Am. Dec. 592.

In *Frost v. Mirsell*, 38 N. J. Eq. 586, 601, REED, J. says: "Had the officer, at the time of payment, made an application of this sum to any particular one of his successive official years, such application, in the absence of any design to defraud sureties of which the county officials were cognizant, would be recognized, and the rights of the sets of sureties would be fixed by the act of the debtor. *State v. Booy*, 10 Vroom 539."

<sup>1</sup> See cases cited in note 2, page 187.

that no presumption arises as a matter of law, that all payments made by him into the treasury during the second term, are made out of moneys collected from the revenues of that year, and in extinguishment of his liabilities as collector incurred during that year. If such payments are made after he is properly chargeable with money for the second term, it may be presumed that they were made on account of the indebtedness of that term, but it may be shown to be otherwise.<sup>1</sup>

§ 293. When official Bonds are cumulative.—Where an officer holding for a term embracing more than one year is required to file a new bond annually, the several bonds so filed during the same term are considered as cumulative and the sureties upon them will be held liable *pro rata*.<sup>2</sup>

Where, however, the officer is to be re-elected annually, the general rule, already considered, will apply that the sureties for each year are liable for the defaults of that year only.<sup>3</sup>

§ 294. When special Bond supersedes general.—Where an officer charged with the performance of general duties in respect of which he gives a general bond, is also required to perform duties of a special kind and to give a special bond for their performance, the special bond is usually held to supersede the general bond as to the special duties, and the sureties upon the general bond will not be held liable for defaults covered by the special bond.<sup>4</sup>

§ 295. Liability of Sureties for Funds illegally received.—An officer who has received money for and on account of his principal can not, in general, when called upon to pay it over,

<sup>1</sup> State v. Smith, 26 Mo. 226, 72 Am. Dec. 204; St. Joseph v. Merlatt, 26 Mo. 283, 72 Am. Dec. 207; Draffen v. Boonville, 8 Mo. 395; Pine County v. Willard, 39 Minn. 125, 39 N. W. Rep. 71.

<sup>2</sup> Moore v. Boudinot, 64 N. C. 190; Poole v. Cox, 9 Ired. (N. C.) 69, 49 Am. Dec. 410; Jones v. Hays, 8 Ired. Eq. 502, 44 Am. Dec. 78.

<sup>3</sup> State v. Davis, 7 Ired. (N. C.) 198.

<sup>4</sup> Sureties upon the general bond of

a county treasurer are not liable for his defaults in respect to school moneys for which he has given a special bond. State v. Young, 28 Minn. 551; County v. Tower, 28 Minn. 45; State v. Starnes, 5 Lea (Tenn.) 545; State v. Mayes, 54 Miss. 417; State v. Felton, 59 Miss. 402, distinguishing State v. Matthews, 57 Miss. 1; State v. Harney, 57 Miss. 863. See also Milwaukee Supervisors v. Pabst, 70 Wis. 363.

defend upon the ground that it was money which his principal had no right to obtain, procure or receive.<sup>1</sup>

And it is held that his sureties are equally estopped.<sup>2</sup> Thus it is held that the sureties on the official bond of a county treasurer are liable for a balance found to be due from him, on a settlement of his account by the auditors, although he was charged therein with scrip issued, during his term, in violation of law, but which he had received, deposited and paid out as money.<sup>3</sup> And so where the public officers have exceeded their legal powers in borrowing money, but the money raised by them has been received by the treasurer, his sureties are liable for his default in keeping and disbursing it.<sup>4</sup>

*A fortiori* are the sureties liable for money lawfully paid and actually received by the officer in his official capacity, though it was raised in excess of the public need.<sup>5</sup>

So the sureties are liable for moneys actually received by the officer from his predecessor, though there may have been some irregularity in the manner in which they were deposited with the predecessor.<sup>6</sup>

§ 296. **Securities estopped to deny official Character of Principal.**—Sureties who have undertaken to answer for the faithful performance by their principal of the duties of a designated office and whose undertaking has been accepted, are estopped, when called upon to respond for him, to object that he was not eligible<sup>7</sup> or was not duly chosen<sup>8</sup> to the office which he has assumed to execute.

<sup>1</sup> See *Mechem on Agency*, § 526.

*Placer County v. Astin*, 8 Cal. 808; *Clark v. Moody*, 17 Mass. 145; *Hammond v. Christie*, 5 Robt. (N. Y.) 160; *Galbraith v. Gaines*, 10 Lea (Tenn.) 568.

<sup>2</sup> *Franklin v. Hammond*, 45 Penn. St. 507; *Wylie v. Gallagher*, 46 Penn. St. 205; *Boehmer v. Schuylkill County*, 46 Penn. St. 452.

<sup>3</sup> *Wylie v. Gallagher*, 46 Penn. St. 205.

<sup>4</sup> *Boehmer v. Schuylkill County*, 46 Penn. St. 452. But a contrary conclusion was reached in *Frost v. Mixsell*, 33 N. J. Eq. 586, where it was

held that where county officers illegally borrowed money for county purposes by giving notes, and this was received by the collector along with the legal funds of the county, his sureties are not liable for a failure to disburse the borrowed money, but are liable for the failure to pay over the legally received funds.

<sup>5</sup> *Sutherland v. Carr*, 85 N. Y. 105.

<sup>6</sup> *Heppe v. Johnson*, 73 Cal. 265.

<sup>7</sup> *Anderson v. Johett*, 14 La. Ann. 614.

<sup>8</sup> *People v. Huson*, — Cal. —, 20 Pac. Rep. 369; *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 79.

§ 297. **Liability of Sureties for Loss of Funds.**—The liability of the principal, and consequently of his sureties, for a loss of the public funds by the principal without intentional wrong upon his part, is a question of great interest and importance, but one upon which the authorities are in conflict.

The undertaking of the principal, and of his sureties for him, that he will faithfully perform the duties of his office includes, either expressly or impliedly, that he will duly pay over the public funds which come into his hands. The question therefore arises, what loss of the public funds can excuse him and his sureties from this undertaking.

And as obviously no loss can excuse them which is based upon the officer's own negligence or default, the question becomes narrowed to this: What loss occurring without his negligence or default will excuse them?

In respect of this question, four theories, at least, have prevailed. Thus—

§ 298. **Same Subject—One View.**—1. One view is based upon the strict language of the bond. The officer having bound himself and his sureties, without reservation or qualification, by the express terms of his bond that he will duly deliver and pay over the public funds which come into his hands, this obligation "can only be met or discharged by making such delivery or payment,"<sup>1</sup> and having bound himself by his solemn agreement to do this act, he must be "held liable for its non-performance though it is rendered impossible by events over which he had no control." If the parties had desired exemption in a given contingency, it should have been "so nominated in the bond."<sup>2</sup>

<sup>1</sup> *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322, citing *State v. Powell*, 67 Mo. 935, 29 Am. Rep. 512; *United States v. Prescott*, 8 How. (U. S.) 578; *United States v. Morgan*, 11 How. (U. S.) 154; *United States v. Dashiell*, 4 Wall. (U. S.) 182; *United States v. Keebler*, 9 Wall. (U. S.) 83; *Boyden v. United States*, 18 Wall. (U. S.) 17.

<sup>2</sup> *Union Township v. Smith*, 39 Iowa 9, 18 Am. Rep. 39, citing *Bacon v. Cobb*, 45 Ill. 47; *School Trus-*

*tees v. Bennett*, 8 Dutch. (N.J.) 513; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Harmony v. Bingham*, 13 N. Y. 99, 62 Am. Dec. 143; *Adams v. Nichols*, 19 Pick. (Mass.) 275, 31 Am. Dec. 187; *School District v. Dauchy*, 25 Conn. 530, 63 Am. Dec. 371; *Brumby v. Smith*, 3 Ala. 123; *Reid v. Edwards*, 7 Port. (Ala.) 508, 31 Am. Dec. 720; *Davis v. Smith*, 4 Greenl. (Me.) 337; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Stone v. Dennis*, 8 Port. (Ala.)

§ 299. *Same Subject—A second View.*—2. A second view, somewhat analogous to the last, is based upon the requirements of the public policy. "Public policy," says McLEAN, J., "requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of Congress.

As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."<sup>1</sup>

§ 300. *Same Subject—A third View.*—3. A third view is based upon the assumption that, by force of the statutes governing the subject, the officer becomes, in effect, the debtor of the public. His liability, therefore, becomes absolute, and, like other debtors, he is not relieved from liability because he is so unfortunate as to lose, though by unavoidable accident, the money

331; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Fowler v. Bott*, 6 Mass. 63; *District Township v. Morton*, 37 Iowa, 550 and distinguishing *Ross v. Hatch*, 5 Iowa 149.

<sup>1</sup> *United States v. Prescott*, 3 How. (U. S.) 578. This view is adopted in *Commissioners v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 463. The court also approves the view first above referred to, and cites *Commonwealth v. Comly*; 3 Penn. St.

372; *Muzzy v. Shattuck*, 1 Den. (N. Y.) 233; *United States v. Dashiell*, 4 Wall. (U. S.) 185; *United States v. Morgan*, 11 How. (U. S.) 153; *United States v. Thomas*, 15 Wall. (U. S.) 338; *State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 368.

This view is also adopted in a recent case, elaborately considered, in *Nevada. State v. Nevin*, 19 Nev. 162, 3 Am. St. Rep. 873.

with which he expected to make payment. In legal effect, he is not a mere bailee, but he loses his own money, and can not, therefore, call upon the public to bear the loss.<sup>1</sup>

These views all lead obviously to the enforcement of an exceedingly strict liability.

§ 301. *Same Subject—A fourth View.*—4. But another view less stringent, and in the opinion of the writer, more consonant with reason and justice, has also met with favor, although the cases which maintain it are few.

By this view the officer is regarded as standing in the position of a bailee for hire,<sup>2</sup> and “bound, *virtute officii*, to exercise good

<sup>1</sup> In *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637, it is said: “In regard to county funds, the treasurers are responsible as debtors, and in the case of vacancy the moneys belonging to the treasury are not to be taken possession of specifically, but are to be delivered over on oath by the previous officer if alive, and in case of his death, by his personal representatives. C. L. 1871, § 518. There is no principle which would allow private persons to meddle with county records or county funds in county possession. It can only be on the theory that the treasurer is a debtor, at all events, for the money received by him, and that the title vests in him personally, that his representatives can have anything to do with the funds. *Accordingly his liability is absolute, and not affected by unavoidable loss or accident*; which, in case of bailments, could not fail to release him, without injustice.”

See also *Colerain v. Bell*, 9 Metc. (Mass.) 499; *Hancock v. Hazzard*, 13 Cush. (Mass.) 112; *Muzzy v. Shattuck*, 1 Denio (N. Y.) 238; *Looney v. Hughes*, 26 N. Y. 514.

In a late Texas case it is said: “It is too well settled to require discussion that an officer who is a custo-

dian of public money does not occupy the relation of a mere bailee for hire, who is responsible only for such care of the money as a prudent man would take of his own. He is bound to account for and pay over the public money, less his commissions, or his sureties must pay it for him. This has been expressly decided in our own State, and also in frequent decisions of the Supreme Court of the United States. *Boggs v. State*, 46 Tex. 10; *Boyden v. United States*, 13 Wall. (U. S.) 17; *United States v. Prescott*, 8 Howard (U. S.) 578; *United States v. Morgan*, 11 Howard (U. S.) 154; *United States v. Dashiell*, 4 Wallace (U. S.) 182.” *WILLIE, C. J.*, in *Wilson v. Wichita County*, 67 Tex. 647. See also *Allen v. State*, 6 Blackf. (Ind.) 252; *Morbeck v. State*, 28 Ind. 86; *Halbert v. State*, 22 Ind. 125; *Rock v. Stinger*, 36 Ind. 846; *Steinback v. State*, 38 Ind. 483; *Board of Justices v. Fennimore*, *Coxe* (N. J.) 242; *Hayes v. Grier*, 4 Binn. (Penn.) 80.

<sup>2</sup> *Cumberland v. Pennell*, 69 Ma. 357, 81 Am. Rep. 284; *York County v. Watson*, 15 S. C. 1, 45 Am. Rep. 674; *United States v. Thomas*, 15 Wall. (U. S.) 344.

In *United States v. Thomas*, 15 Wall. (U. S.) 344, *BRADLEY, J.*, says:

faith and reasonable skill and diligence in the discharge of his trust, or, in other words, to bring to its discharge that prudence,

"The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulation. The ordinary rule will be found illustrated by a number of analogous cases. It is laid down by Justice STORY that officers of courts having the custody of property of suitors are bailees, and liable only for the exercise of good faith and reasonable diligence, and not responsible for loss occurring without their fault or negligence. STORY on Bailments, § 620. Trustees are only bound to exercise the same care and solicitude with regard to the trust property which they would exercise with regard to their own. Equity will not exact more of them. STORY on Bailments, § 620. LEWIN on Trusts, 832, 8d ed. They are not liable for a loss of theft without their fault. *Id.* But this exemption ceases when they mix the trust money with their own, whereby it loses its identity, and they become mere debtors. *Id.* and § STORY's Eq. Jur. § 1270, and see §§ 1268, 1269; also, § SPENCE'S Eq. Jur., 917, 933, 937; WREN v. KIRTON, 11 VESY 381; UTICA INS. CO. v. LYNCH, 11 PAIGE

(N. Y.) 520. Receivers, appointed by the court, though held to a stricter accountability than trustees, on account of their compensation, are nevertheless not liable for a loss without their fault; and they are entitled to manage the property and transact the business in their hands in the usual and accustomed way. KNIGHT v. LD. PLYMOUTH, 3 ATKYNS 480; ROWTH v. HOWELL, 8 VESY 566; LEWIN on Trusts, 832 8d. ed; EDWARDS on Receivers, 573-599; WHITE v. BAUGH, 8 CL. & FIN. 44. A marshal appointed by a court of admiralty to take care of a ship and cargo is responsible only for a prudent and honest execution of his commission. THE RENDBERG, 6 ROBINSON 142, 'Every man,' says Sir William Scott, 'who undertakes a commission incurs all the responsibility that belongs to a prudent and honest execution of that commission. Then the question comes, What is a prudent and honest execution of that commission? The fair performance of the duties that belong to it. \* \* \* He must provide a competent number of persons to guard the property; having so done he has discharged his responsibility, unless he can be affected with fraud, or negligence amounting in legal understanding to fraud.' 6 ROBINSON 154; see also BURKE v. TREVITT, 1 MASON 96, 100. A postmaster is bound to exercise due diligence, and nothing more in the care of matter deposited in the postoffice. He is not liable for a loss happening without his fault or negligence. \* \* \* In certain cases, it is true, a more stringent accountability is exacted, as in the case of a sheriff, in reference to prisoners



caution and attention which careful men usually exercise in the management of their own affairs," but "not responsible for any loss occurring without any fault on his part."

held by him in custody, where the law puts the whole power of the county at his disposal, and makes him liable for an escape in all cases, *except* where it is caused by an act of God or the public enemy; 83 Hen. VI., p. 1; Brooke's Abridgement, tit. Dette, 23; Dalton's Sheriff, 485; Watson on Sheriffs, 140. The exception which thus qualifies the severest exaction of official responsibility known at the common law is worthy of particular notice. \* \* \*

The basis of the common-law rule is founded on the doctrine of bailment. A public officer having property in his custody in his official capacity is a bailee; and the rules which grow out of that relation are held to govern the case. But the legislature can undoubtedly, at its pleasure, change the common-law rule of responsibility. And with regard to the public moneys, as they often accumulate in large sums in the hands of collectors, receivers and depositaries, and as they are susceptible of being embezzled and privately used without detection, and are often difficult of identification, legislation is frequently adopted for the purpose of holding such officers to a very strict accountability. And in some cases they are spoken of as though they were absolute debtors for, and not simply custodians of the money in their hands. In New York, in the case of *Muzzy v. Shattuck*, 1 Denio 233, the court, after a careful examination of the statutory provisions respecting the duties and liabilities of a town collector, came to the conclusion (contrary to its previous decision in the *Supervisors v. Dorr*, 25 Wend.

440), that he was liable as a *debtor*, and not merely as a *bailee*, for the moneys collected by him, and consequently that he could not excuse himself, in an action on his bond, by showing that, without his fault, the money had been stolen from his office.

When, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property, received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility. The mere prescription of duties has nothing to do with the question as to what shall constitute the rule of responsibility in the discharge of those duties, or a legal excuse for the non-performance of them, or a discharge from their obligation. The common law, which is common reason, prescribes that, and statutes, in subordination to their terms, are to be construed agreeably to the rules of the common law. \* \* \*

No ordinary excuse can be allowed for the non-production of the money committed to their hands. Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public money except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official

The statute may, of course, impose, or the officer may himself assume, a more onerous responsibility, but in the contemplation of this theory, a greater liability does not result from the simple undertaking to faithfully discharge the duties of the office.<sup>1</sup>

§ 302. *Same Subject—Illustrations of the stricter Rules.*—In pursuance of the stricter views above referred to, it has been held that where the official bond of the treasurer of a school district was conditioned for the fulfillment of his duties "to the best of his ability and according to law," it was no defense to an action against the officer and his sureties upon the bond, that the moneys received by him had been actually consumed by fire, without want of care and diligence on his part;<sup>2</sup> that a county treasurer is liable, upon his bond, for the loss of public funds deposited by him in a bank and lost through its failure, though the bank was reputed solvent, and such deposit was necessary for the safety of the funds,<sup>3</sup> or although he was guilty of no negligence in failing to ascertain its financial condition,<sup>4</sup> or although he deposited the funds in that bank with the consent of the

bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same."

<sup>1</sup> *Cumberland v. Pennell*, 69 Me. 357, 81 Am. Rep. 284; citing *Mechanics Bank v. Hallowell*, 52 Me. 545; *Potter v. Titcomb*, 7 Me. 302.

In *United States v. Thomas*, 15 Wall. (U. S.) 337, SWAYNE, MILLER and STRONG, J. J. dissented. Mr. Justice MILLER, referring to the previous cases of *United States v. Prescott*, 8 How. 578; *United States v. Morgan*, 11 How. 154; *United States v. Dashiell*, 4 Wall. 183, and *United States v. Keebler*, 9 Wall. 83, said: "When the case of *United States v. Dashiell* came before the court, I was not satisfied with the doctrine of the former cases. I do not believe now that on sound principle the bond should be construed to extend the obligation of the depository beyond what the law imposes upon him,

though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver if no bond had been given, the object of taking the bond, being to obtain sureties for the performance of that obligation.

Nor do I believe that, prior to these decisions, there was any principle of public policy, recognized by the courts or imposed by the law, which made a depository of the public money liable for it when it had been lost or destroyed without any fault of negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safekeeping."

<sup>2</sup> *Union Township v. Smith*, 39 Iowa 9, 18 Am. Rep. 89.

<sup>3</sup> *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 323.

<sup>4</sup> *State v. Powell*, 67 Mo. 395, 28 Am. Rep. 512.

county commissioners,<sup>1</sup> or although the county provided no safe place for making such deposit.<sup>2</sup> *A fortiori* is this so where he deposited the funds in his own name.<sup>3</sup>

So a county treasurer and his sureties have been held liable upon his bond for trust moneys stolen from the safe provided by the county, without any want of care on his part,<sup>4</sup> and for public funds forcibly stolen from him without any fault or negligence on his part.<sup>5</sup>

§ 308. **Same Subject—Illustrations of the more liberal Rules.**—But, on the other hand, in accordance with the more liberal rule regarding custodians of public moneys as bailees for hire, and charged with reasonable skill and diligence in the discharge of his trust, but not liable as an absolute insurer of the safety of the funds, it has been held that a county treasurer and his sureties are not liable, upon a bond conditioned that he “shall well and faithfully attend to the duties of said office and perform all things required by said office to be performed,” for a loss of public moneys of which the officer was violently robbed without his fault;<sup>6</sup> nor for a loss of public funds caused by the subsequent failure of a bank in which he had deposited them, the bank being then in good standing.<sup>7</sup>

So in the United States Supreme Court, a collector of public money and his sureties, who had given a bond to keep it safely and pay it over when required, were held to be excused from its obligations where it appeared that the money had been forcibly seized by the rebel authorities against the will and without the fault or negligence of the officer.<sup>8</sup>

#### d. Release of Sureties.

§ 304. **Sureties released by material Alteration of Contract.**—“It is unquestionably true,” says Bouldin, J., in a recent case,

<sup>1</sup> *Wilson v. Wichita County*, 67 Tex. 647.

<sup>2</sup> *Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 118.

<sup>3</sup> *Ward v. School District*, 10 Neb. 298, 35 Am. Rep. 477.

<sup>4</sup> *Commissioners v. Lineberger*, 8 Mont. 281, 35 Am. Rep. 463.

<sup>5</sup> *State v. Nevin*, 19 Nev. 162, 3 Am. St. Rep. 873.

<sup>6</sup> *Cumberland v. Pennell*, 69 Me. 357, 31 Am. Rep. 284.

<sup>7</sup> *York County v. Watson*, 15 S. Car. 1, 40 Am. Rep. 675.

<sup>8</sup> *United States v. Thomas*, 15 Wall. (U. S.) 337. See full extract from opinion in this case in the note to the preceding section.

"that a surety can only be held bound by his contract as he made it, and that he will be discharged if, by any binding agreement for indulgence to his principal or otherwise, his contract is materially altered or varied by the creditor without his consent. And it is also true that this principle applies alike to sureties in official bonds and private obligations. The contract of the surety cannot be so varied or extended in either case without his consent."<sup>1</sup> And, as a general rule, this principle is well settled.<sup>2</sup>

Sureties, therefore, will be released if after the execution of the bond, but before its delivery, a material alteration is made therein without their consent.<sup>3</sup> This has been held to be true even though the alteration was made by their principal, to whom they had confided the bond for delivery.<sup>4</sup>

So if, after the delivery, material alterations are made in the bond by any of the parties thereto but without the consent of the sureties, the latter will be discharged.<sup>5</sup> Unauthorized alterations by a stranger, however, without the privity of the obligor or obligee will not avoid the bond.<sup>6</sup>

Immaterial alterations, which do not change the nature or effect of the instrument or prejudice the rights or interests of the obligors, will not discharge the sureties.<sup>7</sup>

§ 305. By what Law their Contract interpreted.—The contract entered into by the sureties is ordinarily to be construed by reference to that law, and that only, which was in effect at the

<sup>1</sup> Commonwealth v. Holmes, 25 Gratt. (Va.) 771.

<sup>2</sup> Smith v. United States, 2 Wall. (U. S.) 219, where Mr. Justice CLIFFORD says that the "substance of the rule is, that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety, upon the principle of the maxim *non adde in federa veni*." Bonar v. McDonald, 8 H. L. Cas. 226; Boston Hat Manufactory v. Messinger, 2 Pick. (Mass.) 228; Miller v. Stewart,

9 Wheat. 680; Mayhew v. Boyd, 5 Md. 102, 59 Am. Dec. 101; Gardiner v. Harback, 21 Ill. 129; Darwin v. Rippey, 68 N. C. 318.

<sup>3</sup> See cases cited in note 2, *supra*.

<sup>4</sup> State v. Craig, 58 Iowa, 238.

<sup>5</sup> See cases cited in note 2, *supra*.

<sup>6</sup> United States v. Spalding, 2 Mason (U. S. C. C.) 478, per STORY, J.; Waugh v. Bussell, 5 Taunt. 707; Mattison v. Atkinson, 8 T. R. 158 note c; Henfree v. Bromley, 6 East 309; United States v. Cutts, 1 Gall. (U. S. C. C.) 69; Perrott v. Perrott, 14 East. 423.

<sup>7</sup> Crawford v. Dexter, 5 Sawy. (U. S. C. C.) 201.

time their contract was made and which they then had in contemplation.<sup>1</sup>

It is, indeed, possible for the sureties, by language clearly showing such an intention, to place their undertaking under the effect of future laws, but where this has not been done their rights, liabilities and duties cannot be materially altered to their detriment by future legislation.<sup>2</sup> Some illustrations of this rule will be found in the following section.

§ 306. **Same Subject—Effect of increasing Duties or changing the Character of Office.**—As a rule, the sureties upon an official bond can be held liable for the faithful performance of those duties only which adhered or were germane to the office at the time their undertaking was entered into, and not for other and different duties added to the office after the execution of the bond.

<sup>1</sup> *Commonwealth v. Holmes*, 25 Gratt. (Va.) 771.

<sup>2</sup> Thus in *United States v. Powell*, 14 Wall. (U. S.) 493, 504, Mr. Justice CLIFFORD says, "It must be admitted that any substantial addition by law to the duties of the obligor of a bond, after the execution of the instrument, materially enlarging his liabilities, will not impose any additional responsibility upon his sureties unless the words of the bond, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions." citing *Farr v. Hollis*, 9 B. & C. 332.

<sup>3</sup> *City of Lafayette v. James*, 92 Ind. 240, 47 Am. Rep. 140; *People v. Pennock*, 60 N. Y. 421; *Manufacturers' Nat. Bank v. Dickerson*, 41 N. J. L. 448, 32 Am. Rep. 237; *White Sew. Machine Co. v. Mullins*, 41 Mich. 339; *Mumford v. Memphis & C. R. R. Co.* 2 Lea (Tenn.) 393, 31 Am. Rep. 616.

Thus where a city superintendent of waterworks gave a bond for the proper discharge of his duties and the payment of moneys coming to his

hands, at a time when there was no law or ordinance specifying his duties or requiring any bond, but at the same session that the bond was approved an ordinance was passed defining his duties, one of which was to collect water rents, it was held that his sureties were not liable for his default in paying over such rents collected by him. *City of Lafayette v. James*, 92 Ind. 240, 47 Am. Rep. 140.

Where sureties undertook for the faithful performance of duty by their principal as "assistant clerk" in a bank, and, without the knowledge of his sureties, he was promoted through intermediate positions to that of book-keeper, in which capacity he defaulted, his sureties were held not liable. *Manufacturers' Nat. Bank v. Dickerson*, 41 N. J. L. 448, 32 Am. Rep. 237.

In this case, WOODHULL, J. said:

"That a surety is not to be held beyond the precise terms of his contract is declared by KENT, J. in *Ludlow v. Simond*, 2 Cal. Cas. 1, to be a well-settled rule, both at law and in equity, and to be founded on the

Where the bond is given to secure the faithful execution of a given office and, after the execution of the bond, the whole

most cogent and salutary principles of public policy and justice, *s. c. Am. Dec. 291; McMicken v. Webb, 6 How. 292; Bowmaker v. Moore, 7 Price, 238; Smith v. United States, 2 Wall. 219; McCluskey v. Cromwell, 11 N. Y. 593.*

Resulting from the principles just stated is the familiar rule that the surety is discharged if, without his consent, the principal parties make a new agreement inconsistent with the terms of the original agreement, or in the mode of performing them, *Theobald on Principal and Surety, 119 (1 Law Lib. Vol. LXX.); Whitcher v. Hall, 5 B. & C. 269; Pitman on Principal and Surety, 166 (Law Lib. Vol. XL.)*

From the same principles results also another rule, still more closely applicable to the case before us, namely, that when there is a bond of suretyship given for an officer, and by the act of the obligee the office is materially changed, so as to effect the risk of the surety, the bond, as to him, is avoided.

In *Pybus v. Gibb, 6 E. & B. 902 (38 Eng. Com. L. 83)* a bond was executed by G. and two sureties, conditioned for indemnifying the high bailiff of a county court against liabilities for the misconduct in the office of G. who was appointed by the high bailiff to act under him as bailiff of said court. At the time the bond was executed the jurisdiction of the county court was regulated by statute 9 and 10 Vict. After the execution of the bond the jurisdiction of that court was extended and increased by several statutes. It was held that the statutes had so materially altered the nature of the office of bailiff that the sureties were no

longer liable to indemnify the high bailiff, even though the misconduct of G. was in respect of a matter within the jurisdiction conferred by the statute first named, and as to which the duty of the bailiff was not altered by the latter acts.

CAMPBELL, C. J., who delivered one of the opinions in that case, says:

'It may be considered settled law that where there is a bond of suretyship for an officer, and by the act of the parties, or by act of parliament, the nature of the office is so changed that the duties are materially altered, so as to effect the peril of the sureties, the bond is avoided. \* \* \* The question is whether the nature and functions of the office or employment are changed; for if they are, it is not the same office within the meaning of the bond.'

COLERIDGE, J. in the same case, says: 'The rights and liabilities of sureties has often been considered in England and many points are well established. One is, that when the nature of the employment of the principal is so altered by the act either of his employer or the legislature that the risk of his surety is materially altered, the surety has a right to say, 'I did not bargain for this risk; I am discharged.'

WIGHTMAN, J., says, in the same case: "It may be taken as a principle of law that a bond by a surety, conditioned for the due performance by his principal of the duties of an office, is rendered null if the office or its duties are so altered as in any degree to increase or vary the risk of the surety, to his possible disadvantage." See also *Oswald v. Mayor of Berwick, 5 H. L. Cas. 856, 26 Eng. L. & Eq. 85.*

nature of the office is changed, the bond ceases to be obligatory, because the office is no longer the same within the meaning of the bond.<sup>1</sup>

But the fact that duties were imposed upon the officer, different in their nature from those which he was required to perform at the time the bond was executed, does not render it void as an undertaking for the faithful performance of those which he first assumed. It will still remain a binding obligation for what it was originally given to secure.<sup>2</sup>

So the fact that the duties were imposed after the passage of the statute requiring the bond but before the execution of the bond in controversy will not relieve the sureties.<sup>3</sup>

But the language of the bond may well be such as reasonably to embrace duties, of a character corresponding with those required at the date of the bond, even though they were imposed by subsequent enactments.

Thus in Ohio it is held that where the bond is conditioned for the faithful performance of the duties "according to law," it embraces whatever duties are required of the officer during the term covered by the bond whether the statute requiring them was passed before or after the execution of the bond.<sup>4</sup> And similar rulings have been made in other courts.<sup>5</sup>

Sureties of a sheriff are not bound for his default in the performance of duties as a tax collector, imposed upon him by a law passed after the execution of the bond. *White v. East Saginaw*, 48 Mich. 567.

<sup>1</sup> *Gausson v. United States*, 97 U. S. 584.

<sup>2</sup> *Gausson v. United States*, 97 U. S. 584; *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *Commonwealth v. Holmes*, 25 Gratt. (Va.) 771.

<sup>3</sup> *Marquette County v. Ward*, 50 Mich. 174.

<sup>4</sup> *Dawson v. State*, 88 Ohio St. 1. In this case the sureties on the bond of a county treasurer were held liable where between the date of the bond and the commencement of the term the county treasurer was by law made

*ex officio*, city treasurer, in which capacity the default arose. The court said that the power of the legislature to modify the duties of the officer during his term cannot be doubted, and the exercise of that power must have been within the contemplation of the parties at the time the bond was executed. The case of *King v. Nichols*, 16 Ohio St. 80, was cited and approved.

<sup>5</sup> *Mayor v. Kelly*, 98 N. Y. 487; *Board v. Quick*, 99 N. Y. 188. In *United States v. Powell*, 14 Wall. (U. S.) 493, 501, CLIFFORD, J. says:

"By the recital of the bond it appears that the principal therein named intended, on and after that date, to be engaged in the business of distillers within the fifth collection district of

§ 307. Not released by Extension of Time for accounting.—  
Laws creating a public office and requiring a bond for its faith-

the state, and the condition of the bond is that they shall, *in all respects*, faithfully comply with *all* the provisions of law in relation to the duties and business of distillers, and that they shall pay all penalties incurred or fines imposed on them for a violation of any of the said provisions. Stronger language to signify an intention to stipulate that the principals in the bond should comply with duties subsequently imposed by law in relation to the business of a distiller could not well be employed, as the language of the bond is that they shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, knowing as all the obligors did that Congress might at any time enact new provisions imposing new duties or vary those already imposed. *Bartlette v. Governor*, 2 Bibb. 586; *Minor v. Mechanics' Bank*, 1 Peters, 78. Both parties, it must be assumed, knew that changes might be made in that behalf at any time, and the defendants must have understood that it never could have been intended that a new bond should be required with every modification made in relation to the duties and business in which the principals in the bond were about to engage. Where a person was elected sheriff and executed a bond to the county conditioned that he would well and faithfully in all things discharge the duties of the office during his continuance in the same, by virtue of his said election, the Supreme Court of Ohio held that the language of the bond was broad enough, not only to embrace any duty imposed at the date of the bond, but any also that might be imposed upon

the offices by law during the term for which the bond was given.

*King et al. v. Nichols et al.*, 16 Ohio State 83; *United States v. Bradley*, 10 Peters, 848; *Cameron v. Campbell*, 8 Hawks, 285. Bonds in such cases, as well as in cases like the one before the court, are required to secure the faithful discharge of the duties ordinarily imposed upon the principal obligor, without reference to the time when the law was passed imposing the duty, and where, as in this case, the language of the bond is sufficiently comprehensive to embrace duties subsequently imposed, of a character corresponding with those required at the date of the bond, the construction which gives a prospective as well as retrospective operation to the condition of the bond may well be adopted as both reasonable and just to all concerned. *White v. Fox*, 22 Maine, 841; *United States v. Hodson*, 10 Wallace, 406; *United States v. Tingey*, 5 Peters, 127.

Exceptional cases may doubtless arise, as where the condition of the bond is, in terms, or by a fair and reasonable construction, limited to existing duties, or where the appointment is a temporary one, to expire at the end of the next session of the Senate. Different rules are applied in the case of a temporary appointment, as the commission is for a different tenure, and unless there is something in the act under which the first commission issued showing that it contemplated a permanent and continuing responsibility under laws subsequently passed, the rule is that the liability of sureties must be strictly confined to the duties created by the acts passed antecedent to the date of



ful execution usually provide that the incumbent shall be called upon by designated officials at stated times to account for the moneys received by him by virtue of his office. These laws, however, which require such accounting, though they may have entered into the contemplation of the sureties at the time they signed the bond, are generally held to constitute no part of the *contract* of the surety and the latter is, therefore, not released because the time fixed for such accounting is subsequently altered or extended by law.<sup>1</sup>

"Forming no part of that contract," it is said in one case,<sup>2</sup> "it follows as a necessary consequence, that like any other act of a like nature, the provision may be extended, altered or repealed at the will of the legislature and without the assent of the surety, looking alone to the public interest. And we think, as a general rule, that what in such a case will advance the public good, will at the same time protect the interest of the surety. Indeed the indulgence granted to the officer by the extension of time in this case, is not a contract, but is an ordinary act of legislation for the public good, with no consideration for the extension moving from the officer, and is repealable at the will of the general assembly."

#### § 308. Sureties not released by Laches of Government

the bond. *United States v. Kirkpatrick, 9 Wheaton, 780.*"

But in *White v. East Saginaw*, 48 Mich. 567. GRAVES, J. says that "the law will not intend that duties not yet existing and not germane to the office were within the contemplation of the sureties, or within the proper scope of their undertaking. *Gausseu v. United States*, 97 U. S. 584; *Converse v. United States*, 21 How. (U. S.) 468; *Commonwealth v. Holmes*, 25 Gratt. (Va.) 771. And it must be observed further that in proceeding to ascertain whether the new duties were or were not adventitious, they cannot be considered otherwise as against the sureties unless their affinity to the office is plain and obvious. This rule is one of manifest

justice. *St. Louis v. Sickles*, 52 Mo. 122; *Mayor v. Crowell*, 11 Vroom (N. J.) 207, 29 Am. Rep. 234; *Citizens Loan Association v. Nugent*, 11 Vroom 215, 29 Am. Rep. 230; *Amherst Bank v. Root*, 2 Metc. 536; *Kittson v. Julian*, 4 El. & Bl. 854, 30 Eng. L. & Eq. 326."

<sup>1</sup> *Commonwealth v. Holmes*, 25 Gratt. (Va.) 771; *Smith v. Commonwealth*, 25 Gratt. (Va.) 780; *Crawn v. Commonwealth*, 84 Va. 283, 4 S. E. Rep. 721; *State v. Carleton*, 1 Gill. (Md.) 249.

*Contra*, *Davis v. People*, 1 Gilm. (Ill.) 409; *People v. McHatton*, 2 Gilm. (Ill.) 639.

<sup>2</sup> *Commonwealth v. Holmes*, 25 Gratt. (Va.) 771.

**Agents.**—*A fortiori* are the sureties not released by the mere delay, negligence or laches of the government officials in calling the sureties' principal to account, or in pursuing the remedy upon the bond. "The general principle," says Judge STORY, "is that laches is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents: and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities. \* \* \* It is said that the laws require that settlements should be made at short and stated periods; and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its own officers. *They are merely directory to such officers, and constitute no part of the contract with the surety.* The surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has of this the same means of judgment as the government itself and the latter does not undertake to guarantee such fidelity."<sup>1</sup>

The fact that the delay is great or the laches gross will not alter the rule.<sup>2</sup>

<sup>1</sup> United States v. Kirkpatrick, 9 Wheat. (U. S.) 720. To the same effect are United States v. Vanzandt, 11 Wheat. 184; United States v. Nicholl, 12 Wheat. 509; United States v. Boyd, 15 Peters (U. S.) 187; Commonwealth v. Holmes, 25 Gratt. (Va.) 771; Smith v. Commonwealth, 25 Gratt. (Va.) 780; Crawn v. Commonwealth, 84 Va. 282, 4 S. E. Rep. 731; Dox v. United States, 1 Peters (U. S.) 818.

People v. Jansen, 7 Johns. (N. Y.) 333, 5 Am. Dec. 375, to the contrary is denied by STORY, J., in United States v. Kirkpatrick, 9 Wheat. (U. S.) 720, and has been practically

overruled in New York; Looney v. Hughes, 26 N. Y. 514; McKecknie v. Ward, 58 N. Y. 541, 17 Am. Rep. 281, where FOLGER, J., says it has not been followed in New York, citing People v. Berner, 18 Johns. 883; People v. Foot, 19 Johns. 58; People v. Russell, 4 Wend. 570; Looney v. Hughes, 26 N. Y. 514; and Jones v. United States, 18 Wall. (U. S.) 663.

See also Freaner v. Yingling, 37 Md. 491; Pittsburgh, &c., R. R. Co. v. Shaeffer, 59 Penn. St. 350.

<sup>2</sup> Thus in Dox v. Postmaster-General, 1 Pet. (U. S.) 218; MARSHALL, C. J., speaking of United States v. Kirkpatrick, 9 Wheat. 720, and

§ 309. **Sureties not discharged by Concealment of previous Default.**—It is held, in a recent case, that the fact that the government agents knew, at the time they took the bond of an officer with sureties, that he had been a defaulter in a previous term, and that they did not disclose this fact to the sureties, was not a fraud upon the sureties and did not operate to release them from their bond. The government agents, the court held, were under no obligation to voluntarily warn the sureties, nor to protect them from their principal's possible dishonesty in the future by declining to accept their tendered suretyship. If the bond was sufficient, it was the duty of the government agents to accept it.<sup>1</sup>

The same question has also arisen in the case of private agents, and while the prevailing rule seems to be that the creditor is under no obligation to give a voluntary warning,<sup>2</sup> there are numerous and well considered cases which impose it.<sup>3</sup>

*United States v. Vanzandt*, 11 Wheat. 184, says: "These two cases seem to fix the principle that the laches of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond, from the obligation it creates, as firmly as the decisions of this court can fix it."

<sup>1</sup> *Pine County v. Willard*, 19 Minn. 125, 89 N. W. Rep. 71. No cases are cited by the court.

<sup>2</sup> *Roper v. Sangamon Lodge*, 91 Ill. 518, 38 Am. Rep. 60. In this case it was held that the sureties upon the bond of the treasurer of a secret society, conditioned for the faithful application of the trust moneys, cannot escape liability for a misappropriation by the fact the treasurer has misappropriated funds in the preceding year to the knowledge of the officers and members of the society, but not of the sureties, and had been re-elected without any notice of the defalcation to the sureties.

In *Home Insurance Co. v. Halway*, 55 Iowa 571, 39 Am. Rep. 179, the court approve *Roper v. Sangamon*

*Lodge, supra*, and held that the creditor is under no obligation to volunteer information of a previous default, citing also, *Ham v. Greve*, 84 Ind. 18; *Atlantic & Co. Telegraph Co. v. Barnes*, 64 N. Y. 835, 21 Am. Rep. 621; *Cawley v. People*, 95 Ill. 249; *Remington Sewing Machine Co. v. Kezertee*, 49 Wis. 409; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 281;

*Magee v. Manhattan L. Ins. Co.* 93 U. S. 93, is an interesting case upon this subject, and in line with the cases above cited.

<sup>3</sup> Thus, in *Dinsmore v. Tidball*, 34 Ohio St. 411, it is said: "Admitting that a principal, in accepting a guaranty for the faithful and honest conduct of his agent, is not bound under all circumstances to communicate to the guarantor every fact within his knowledge, which increases the risk, yet we think there can be no doubt, either upon principle or authority, that when an agent has acted dishonestly in his employment, the principal, with a knowledge of the fact,

At all events, however, active misrepresentation, fraud or concealment as to the previous default, would, in either case, undoubtedly operate to release the sureties.<sup>1</sup>

§ 310. **Same Subject—Duty of notifying Sureties of subsequent Defaults.**—Analogous to that of the preceding section is the question of the duty of the government agents to notify sureties of defaults by their principal occurring during the term for which they have become bound.

This question has not frequently arisen in regard to public officers, but in the case of private agents it has been often raised, and, though the decisions are far from uniform, the decided tendency is toward the rule stated in *Massachusetts*<sup>2</sup> that “the creditor owes no duty of active diligence to take care of the interest of the surety. It is the business of the surety to see that his principal performs the duty which he has guaranteed,

cannot except a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, and to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge under such circumstances would be a fraud upon the guarantor.”

The same ruling has been made in *Sooy ada. State*, 39 N. J. L. 135; *Franklin Bank v. Cooper*, 36 Me. 179, *Smith v. Bank of Scotland*, 1 Dow 373; *Railton v. Mathews*, 10 Cl. & F. 934. See also *Phillips v. Foxall*, L. R. 7 Q. B. 666, 3 Eng. Rep. 259; *Sander-son v. Aston*, L. R. 8 Ex. 73, 4 Eng. Rep. 453.

<sup>1</sup> *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23, 19 Am. Rep. 50. In this case defendants became sureties on the official bond of a bank cashier, being induced to do so by a statement published by the directors, according to law, whereby the affairs of the bank appeared to be well managed. The cashier of the bank was a defaulter when the statement was

published, of which fact the directors, by the use of slight care, might have learned. In an action on the bond for subsequent embezzlements, it was held that the sureties were not liable; they had a right to believe that, before publishing the statements, the directors had used reasonable diligence in ascertaining the condition of the bank, and, being misled by this statement, were not bound. See also *Franklin Bank v. Cooper*, 36 Me. 179.

<sup>2</sup> *Watertown F. Ins. Co. v. Simmons*, 181 Mass. 85, 41 Am. Rep. 196. In this case an insurance agent had given a bond with sureties for the faithful performance of his duties according to the company's by-laws. A by-law required monthly accounting and paying over. He accounted regularly, but one month neglected to pay over the whole balance due, and after that his indebtedness increased, without notification to the sureties, until it exceeded the penal sum, but it was held that the sureties were not discharged.

and not that of the creditor.<sup>1</sup> The surety is bound to inquire for himself; and cannot complain that the creditor does not notify him of the state of the accounts between him and his agent, for whom the surety is liable. *Mere inaction of the creditor will not discharge the surety unless it amounts to fraud or concealment.*"<sup>2</sup>

The English rule, however, is otherwise. Thus it is said in a leading case:<sup>3</sup> "We think that in a case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." And this case has, with some variations, been followed by several of the American courts.<sup>4</sup>

<sup>1</sup> The court cite *Wright v. Simpson*, 6 Ves. 714; *Adams Bank v. Anthony*, 18 Pick. (Mass.) 298; *Taft v. Gifford*, 18 Metc. (Mass.) 187; *Tapley v. Martin*, 116 Mass. 275, and refuse to follow *Sanderson v. Aston*, L. R. 8 Ex. 78, 4 Eng. Rep. 452.

<sup>2</sup> In *Atlantic, &c., Telegraph Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621, it was held that the sureties upon a bond given by an employee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from a subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employee.

To the same effect is *McKechnie v. Ward*, 58 N. Y. 511, 17 Am. Rep. 281.

In *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 281, it held that it is no defence to the sureties upon the bond of bank cashier that the directors have been negligent in examining his accounts. To avoid the bond on the ground of fraud on the bank or its directors, there must be a fraudulent concealment of some thing material for the surety to know.

<sup>3</sup> *Phillips v. Foxall*, L. R. 7 Q. B. 668, 3 Eng. Rep. 259. This case was followed in *Sanderson v. Aston*, L. R. 8 Ex. 78, 4 Eng. Rep. 452; see also *Burgess v. Eve*, L. R. 18 Eq. Cas. 450, 3 Eng. Rep. 379.

<sup>4</sup> In *Charlotte, &c., R. R. Co. v. Gow*, 59 Ga. 685, 27 Am. Rep. 403, it is held that the agent of a corporation being under bond to account and pay over daily, cannot be trusted with more moneys at his sureties' risk after dishonesty of the agent is discovered by the corporation. But he may be so

It is obvious, however, that the application of this rule to the case of public officers must frequently be embarrassing if not impossible, inasmuch as that which "is a most material ingredient in the consideration of the question,"—"the right of the master at once to discharge the servant on discovering his dishonesty, and so place himself in *statu quo*," must in many cases be either wanting altogether, or be capable of exercise only by judicial procedure.

#### 4. *Approval of Bonds.*

§ 311. **Necessity of Approval.**—The statutes requiring bonds to be given usually require that, before they are accepted, they shall be examined and approved by some representative of the government. The purpose of this examination is, obviously, that there shall be some means by which the public may be assured that the bond tendered is sufficient in form and amount and is so executed as to effectuate the objects contemplated in its requirement.

§ 312. **Examination and Approval a public Duty.**—It is also evident that the duty imposed upon the officer charged with the responsibility of examining and approving or rejecting the bond, is one owing to the public, and not to the principal or his sureties.

This being so, the officer is under no obligation to look after the interests of the sureties upon the bond or to protect them from loss, and is not liable to them for a loss which they may sustain by reason of his violation of his duty<sup>1</sup> And this rule is not altered by the fact that he is alleged to have violated his duty "wilfully" or "maliciously" or "to oppress" the plaintiff.<sup>2</sup>

§ 313. **Failure to approve, or Defects in Approval do not release Sureties.**—Approval being thus for the protection of the

trusted so long as the circumstances fairly interpreted point, not to moral turpitude, but to a want of diligence or punctuality rather than to a want of integrity.

The court call "special attention" to *Pittsburgh, &c., Ry. Co. v. Shaeffer*, 59 Penn. St. 350; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep.

231; *McKecknie v. Ward*, 58 N. Y. 541, 17 Am. Rep. 231; *Phillips v. Foxall*, L. R. 7 Q. B. 666, 8 Eng. Rep. 259, and *Sanderson v. Aston*, L. R. 8 Ex. 78, 4 Eng. Rep. 452.

<sup>1</sup> *Held v. Bagwell*, 58 Iowa 189; *Cooley on Torts* 379.

<sup>2</sup> *Held v. Bagwell*, 58 Iowa 189.

public only, it is well settled that where, by virtue of the bond, the officer has been inducted to the office, his sureties can not escape liability for his defaults because the bond was not approved by the proper officer<sup>1</sup> or was not approved at all.<sup>2</sup>

§ 314. **Whether Approval is a ministerial or judicial Act.**—Whether the approval of the bond of a public officer is to be regarded as a judicial or as a ministerial act is a question upon which the authorities are in conflict.

Upon the one hand it is held that, even where the duty is imposed upon judicial officers, the act is essentially a ministerial one; while on the other hand it is said that the act requires the exercise of judgment and discretion and is judicial in its nature. In cases of the first class, it follows that the performance of the duty may be enforced by mandamus,<sup>3</sup> but where the latter view prevails, mandamus will not lie.<sup>4</sup>

In Michigan<sup>5</sup> it is said that the duty is a *quasi* judicial one, and that it is this, at least, seems to be the better view.

<sup>1</sup> People v. Johr, 23 Mich. 461.

<sup>2</sup> People v. Edwards, 9 Cal. 286;  
McCracken v. Todd, 1 Kans. 148;  
Young v. State, 7 Gill & J. (Md.)  
253; People v. Wardwell, 17 Ill. 278.

<sup>3</sup> State v. County Court, 41 Mo. 321,  
and 545; State v. County Court, 44

Mo. 230; Beck v. Jackson, 43 Mo.

117; Oliver v. Martin, 36 Ark. 184.

<sup>4</sup> *Ex parte* Harris, 53 Ala. 87, 23  
Am. Rep. 559, overruling *Ex parte*  
Candee, 43 Ala. 386; State v. Ely, 43  
Ala. 533; *Ex parte* Thompson 53  
Ala. 98; Swan v. Gray, 44 Miss. 393.

<sup>5</sup> Bay County v. Brock, 44 Mich. 45.

## CHAPTER VIII.

## OF OFFICERS DE FACTO.

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320. Same Subject—Illustrations.

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322. Officer *de Facto* and Officer *de Jure*  
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zement.338. Must respond for his Negli-  
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ceasing to act.

341. Is liable upon his Bond.

342. When he sues or defends in  
his own Right must show  
valid Title.343. His Title cannot be tried col-  
laterally.344. *Quo Warranto* is the Remedy.345. Injunction will not lie to pre-  
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stall Officer *de Jure*.

§ 315. Purpose of Chapter.—It having been seen in the pre-  
ceding chapters who may be chosen to public office and how that  
choice is to be expressed, it now remains to consider the rights,  
duties and liabilities of one who assumes to act as a public offi-  
cer, but whose right to the office can not be traced by all of the



steps which the law has prescribed to be taken. Such an officer, to distinguish him from one whose legal title is clear—the office *de jure*, and from one who has no color of right at all—the mere intruder or usurper, is frequently spoken of as an officer *de facto*.

§ 316. *Officer de Jure defined.*—To recall somewhat definitions already given, an officer *de jure* may be defined as one who has the lawful right to the office in all respects, but who has either been ousted from it, or who has never actually taken possession of it.<sup>1</sup> When the officer *de jure* is also the officer *de facto*, the lawful title and possession are united.<sup>2</sup>

§ 317. *Officer de Facto defined.*—Some doubt has existed in earlier times as to the measure of the requisites which should entitle one to be adjudged an officer *de facto*. Thus in some early English cases it is said that in order to constitute one an officer *de facto* it is necessary that his claim to the office should be supported by some form or color of an election,<sup>3</sup> and these cases have received some following in the United States.<sup>4</sup>

But in a later English case,<sup>5</sup> Lord Ellenborough defined an officer *de facto* to be “one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law;” and this definition has, in substance, been adopted by the majority of the cases, and the necessity for a color of election has not been affirmed, so far as the rights of third persons are concerned.<sup>6</sup>

<sup>1</sup> *Hamlin v. Kassafer*, 15 Oreg. 456, 8 Am. St. Rep. 176; *Plymouth v. Painter*, 17 Conn. 585. But in *State v. Staton*, 78 N. C. 546, 21 Am. Rep. 479, an officer *de jure* is said to be one who is regularly and lawfully elected or appointed, and inducted into office and exercises the duties as his right.

<sup>2</sup> *Hamlin v. Kassafer*, 15 Oreg. 456, 8 Am. St. Rep. 176.

<sup>3</sup> *King v. Lisle*, 2 Strange 1090, 2 C. Andrews 163. But see the elaborate comments on this case by BUTLER, C. J., in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

<sup>4</sup> *People v. Collins*, 7 Johns. (N. Y.) 549; *McInstry v. Tanner*, 9 Johns. 185; *Cocke v. Halsey*, 16 Pet. (U. S.) 71; *Douglass v. Wickwire*, 19 Conn. 493; *McCall v. Mfg. Co.* 6 Conn. 428; *Fitchburg Railroad v. Grand Junction Railroad*, 1 Allen (Mass.) 553; *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *Carleton v. People*, 10 Mich. 250.

<sup>5</sup> *King v. Bedford Level*, 6 East 356. See also *Parker v. Kett*, 13 Mod. 467.

<sup>6</sup> See *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409;

It will be evident that the question will assume different aspects according to the position from which it arises.

Thus if the title of the assumed officer be directly assailed by the State, in a proper proceeding, it will be necessary for him to show himself something more than an officer in fact. So in a direct proceeding brought by the assumed officer himself to secure rights which belong only to an officer *de jure*, it may be necessary for him to show himself to be such.

But when the question of the protection of the rights of third persons is involved different considerations must apply. "Third persons," it is said, "from the nature of the case, can not always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called into question."

§ 318. *Same Subject—Chief Justice Butler's Definition.*—In this view, perhaps the most comprehensive definition is that given by BUTLER, C. J., in a leading case in Connecticut.\* "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calcu-

*Brown v. Lunt*, 37 Me. 423; *Cary v. State*, 76 Ala. 78, 58 Am. Rep. 440 n.

\* *DEVENS, J.*, in *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 885, citing *Brown v. Lunt*, 37 Me. 423; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

<sup>2</sup> *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409. See also *Hamlin v. Kassafer*, 15 Oreg. 456, 3 Am. St. 176; *Creighton v. Commonwealth*, 33 Ky. 142, 4 Am. St. Rev. 143; *Mallet*

*v. Mining Co.* 1 Nev. 188, 90 Am. Dec. 484; *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62; *Burke v. Elliott*, 4 Ired. (N. C.) L. 355, 42 Am. Dec. 142; *People v. Staton*, 78 N. C. 546, 21 Am. Rep. 479; *Sheehan's Case*, 123 Mass. 445, 23 Am. Rep. 374; *Wilcox v. Smith*, 5 Wend. (N. Y.) 231, 31 Am. Dec. 213; *Hildreth v. McIntire*, 1 J. J. MARSH. (Ky.) 206, 19 Am. Dec. 61.

lated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

Second, under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition, as to take an oath, give a bond or the like.

Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public.

Fourth, under color of an election, or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

§ 319. *Same Subject—Color of Right necessary.*—But although the officer *de facto* may not be required to be in by color of election or appointment, yet he must, to distinguish him from a mere intruder or usurper, be in by some color of right. And, in harmony with the rule last quoted, it has been said "that the color of right which constitutes one an officer *de facto* may consist in an election or appointment, or in holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for such a length of time as to raise the presumption of colorable right by election or appointment."<sup>1</sup>

The rule extends to officers of all grades, executive, ministerial or judicial, and to inferior as well as superior officers.<sup>2</sup>

It will be obvious, under this rule, that one who at first was but a mere usurper may by acquiescence become an officer *de facto*.

§ 320. *Same Subject—Illustrations.*—Illustrations of this rule are numerous, but enough will be given to show its application. Thus a person exercising the functions of a valid public office by

<sup>1</sup> LORD, C.J., in *Hamlin v. Kassafer*, 15 Oregon, 456, 8 Am. St. Rep. 76.

<sup>2</sup> *Sheehan's Case*, 122 Mass. 445, 28 Am. Rep. 374; *Milward v. Thatcher*, 2 T. R. 81; *People v. White*, 24 Wend. 527; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

One cannot be a *de facto* officer when he is constantly in hiding, has no place of business, and can only be communicated with by means of his friends in secret. *Williams v. Clayton*, — Utah —, 21 Pac. Rep. 398.

color of right and with the acquiescence of the public will be deemed to be an officer *de facto* and his acts will protect third persons even though he was elected under an unconstitutional statute;<sup>1</sup> or was not eligible to the office;<sup>2</sup> or though the office to which he was chosen was unlawfully vacated;<sup>3</sup> or the election was held without the proper notice;<sup>4</sup> or though he was appointed when he should have been elected;<sup>5</sup> or though he has legally forfeited his office by the acceptance of an incompatible one,<sup>6</sup> or by removing from the county,<sup>7</sup> or though he has not given the prescribed bond,<sup>8</sup> or only a defective one;<sup>9</sup> or though the bond was not duly filed;<sup>10</sup> or though he has held over after the expiration of his term.<sup>11</sup>

§ 321. **Usurper or Intruder defined.**—Contra-distinguished from the officer *de facto*, is the mere usurper or intruder who is one who has intruded upon the office and assumes to exercise its functions without either the lawful title or the color of right to it.<sup>12</sup> His acts, therefore, are entirely void.<sup>13</sup> He may, however, as is stated in the last section, grow into an officer *de facto*. if his assumption of the office is acquiesced in.<sup>14</sup>

<sup>1</sup> State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Cole v. Black River Falls, 57 Wis. 110, Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89.

<sup>2</sup> Farrier v. State, — N. J. L. — 7 Atl. Rep. 881; Darrow v. People, 8 Colo. 417; Lockhart v. City of Troy, 4 Ala. 579.

<sup>3</sup> Watkins v. Inge, 24 Kans. 612.

<sup>4</sup> Yorty v. Paine, 62 Wis. 154.

<sup>5</sup> Chicago & C. Ry. Co. v. Langlade County, 56 Wis. 614.

<sup>6</sup> Woodside v. Wagg, 71 Me. 207.

<sup>7</sup> Case v. State, 69 Ind. 46.

<sup>8</sup> Gunn v. Tackett, 67 Ga. 725; Soudant v. Wadhams, 46 Conn. 218.

<sup>9</sup> Adams v. Tator, 42 Hun (N. Y.) 384.

<sup>10</sup> State v. Dierberger, 90 Mo. 369; Douglass v. Neil, 7 Heisk. (Tenn.) 438.

<sup>11</sup> Petersilea v. Stone, 119 Mass. 465, 20 Am. Rep. 335; Galbraith v.

McFarland, 3 Cold. (Tenn.) 267, 91 Am. Dec. 231; Morton v. Lee, 28 Kans. 286; Threadgill v. Railroad Co. 73 N. C. 178; Wapello County v. Bigham, 10 Iowa 39, 74 Am. Dec. 370.

<sup>12</sup> Hamlin v. Kassafer, 15 Oreg. 456, 3 Am. St. Rep. 176; Plymouth v. Painter, 17 Conn. 585, 44 Am. Dec. 574.

<sup>13</sup> Hamlin v. Kassafer, 15 Oreg. 456, 3 Am. St. Rep. 176; Hooper v. Goodwin, 48 Me. 80; Tucker v. Aiken, 7 N. H. 113; McCraw v. Williams, 38 Gratt. (Va.) 510, where CHRISTIAN, J., says: "A mere usurper is one who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever, and his acts are void in every respect."

<sup>14</sup> State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409.

§ 322. **Officer de Facto and Officer de Jure can not both hold at same Time.**—It is evident that two different persons can not, at the same time, be in the actual occupation and exercise of an office for which one incumbent only is provided by law. There can not, therefore, be an officer *de jure* and another officer *de facto* in possession of the same office at the same time. Hence if the officer *de jure* is in, there is no room for an officer *de facto*; and if the officer *de facto* is in, the officer *de jure* can not be in also.<sup>1</sup>

§ 323. **Two Officers de Facto can not hold at same Time.**—For like reasons there can not, at the same time, be two different officers *de facto* in possession of an office for which one incumbent only is provided by law.<sup>2</sup>

§ 324. **Can not be Officer de Facto where there is no Office.**—So, in the very nature of the case, there can be no officer *de facto* where no officer *de jure* is provided for by law, or, as is said in one case, “there can be no officer, either *de jure* or *de facto*, if there be no office to fill.”<sup>3</sup>

“Where the law has provided that an office may legally be filled,” says CAMPBELL, J., “then the acts of an incumbent may be valid although not lawfully appointed, because the public, being bound to know the law, know that somebody may or should fill the place and perform the duties; and possession would as to them be evidence of title.

But where the law itself negatives the idea that there can be a legal incumbent, any one assuming to act assumes what every one is bound to know is not a legal office, and his acts can not be effectual for any purpose.”<sup>4</sup>

<sup>1</sup> Boardman v. Halliday, 10 Paige (N. Y.) 232; Conover v. Devlin, 15 How. (N. Y.) Pr. 470; Cohn v. Beal, 61 Miss. 398.

<sup>2</sup> Hamlin v. Kassafer, 15 Oreg. 456; 3 Am. St. Rep. 176; Conover v. Devlin, 15 How. Pr. 470; McCahon v. Commissioners, 8 Kans. 438; Boardman v. Halliday, 10 Paige (N. Y.) 232; Morgan v. Quackenbush, 23 Barb. (N. Y.) 80.

<sup>3</sup> Carleton v. People, 10 Mich. 250;

Norton v. Shelby County, 118 U. S. 425; Yorty v. Paine, 62 Wis. 154; Cole v. Black River Falls, 57 Wis. 110; *In re* Hinkle, 31 Kana. 712; Burt v. Winona, 31 Minn. 472, per MITCHELL, J.; Leach v. People, 123 Ill. 420, 12 N. E. Rep. 726; People v. White, 24 Wend. (N. Y.) 539; *Ex parte* Snyder, 64 Mo. 58.

<sup>4</sup> Carleton v. People, 10 Mich. 250, 258.

§ 325. *Office de Facto* can not exist under constitutional Government.—Offices in the United States are created by, or in pursuance of, the respective constitutions of the State and Federal governments, and can not exist unless so ordained. Hence it is held that while there may be officers *de facto*, an office *de facto* can not exist under a constitutional government.<sup>1</sup> See Cal

Where, however, the government is entirely revolutionized and all its departments are usurped by force, then, it is said, prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries; and in such cases the acts of a *de facto* executive, a *de facto* judiciary and a *de facto* legislature must be recognized as valid.<sup>2</sup>

§ 326. *Office created by unconstitutional Statute not de Facto*.—In the same line, it is held that an office created by an unconstitutional statute is not even an office *de facto*, nor is the person who assumes to exercise it an officer *de facto*.<sup>3</sup> "The idea of an officer," says Mr. Justice FIELD, "implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as in-

<sup>1</sup> Hildreth v. McIntire, 1 J. J. MARSH. (Ky.) 206, 19 Am. Dec. 61; Hawver v. Seldenridge, 2 W. Va. 274, 94 Am. Dec. 532; Norton v. Shelby County, 118 U. S. 425, 446; Petition of Hinkle, 81 Kans. 712; contra, Burt v. Winona, 81 Minn. 472.

<sup>2</sup> Hildreth v. McIntire, 1 J. J. MARSH. (Ky.) 206, 19 Am. Dec. 61; Hawver v. Seldenridge, 2 W. Va. 274, 94 Am. Dec. 532.

<sup>3</sup> Norton v. Shelby County, 118 U. S. 425.

operative as though it had never been passed. \* \* \* Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached."<sup>1</sup>

§ 327. But Officer may be *de Facto* though chosen under unconstitutional Statute.—But the rule laid down in the last section does not conflict with the fourth subdivision of the definition of Chief Justice BUTLER heretofore referred to, *i. e.* one chosen "under color of an election or an appointment by or pursuant to a public, unconstitutional law before the same is adjudged to be so."<sup>2</sup> This subdivision, says Mr. Justice FIELD, "refers not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing."<sup>3</sup>

√ § 328. Acts of Officer *de Facto* valid as to Public.—Third persons who have occasion to deal with a public officer and to rely upon his acts, finding a person in the apparent possession of the office and ostensibly exercising its functions lawfully and with the acquiescence of the public, can neither be expected to know, nor to investigate, in every instance, his title to the office or his eligibility to election to it. As to them, he must be held to be, what he appears to be, the lawful occupant of the office. This rule is demanded by public policy as the only one affording protection to the public.

It is well settled, therefore, that the lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of the office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.<sup>4</sup>

<sup>1</sup> In *Norton v. Shelby County*, 118 U. S. 425, 442.

<sup>2</sup> See *ante*, § 318.

<sup>3</sup> In *Norton v. Shelby County*, 118 U. S. 425, 446. See also *Cole v. Black River Falls*, 57 Wis. 110.

<sup>4</sup> *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335; *State v. Carroll*, 88 Conn. 449, 9 Am. Rep. 409; *Wilcox v. Smith*, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *Hamlin*

*v. Kassafer*, 15 Oreg. 456, 3 Am. St. Rep. 176; *Creighton v. Commonwealth*, 88 Ky. 142, 4 Am. St. Rep. 143; *Burton v. Patton*, 2 Jones (N. C.) L. 124, 62 Am. Dec. 194; *State v. Williams*, 5 Wis. 308, 68 Am. Dec. 65; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *Hawver v. Seldenridge*, 2 W. Va. 274, 94 Am. Dec. 533; *Burke v. Elliott*, 4 Ired. L. 355; 43 Am. Dec. 142; *Farmers' Bank v. Chester*, 6 Humph. (Tenn.) 458, 44 Am.

But the acts done must be such as might lawfully be done by an officer *de jure*, for the acts of an officer *de facto*, when declared void by the constitution or a statute, can not be held valid upon any assumed principle of public expediency.<sup>1</sup>

So the rule can not apply where the defects in the title of the assumed officer are notorious, and the persons dealing with him have notice of the facts.<sup>2</sup>

§ 329. Same Subject—Illustrations.—Illustrations of the rule that the acts of *de facto* officers are valid as respects the rights of third persons, are numerous.

Thus the following acts have been held valid:—The approval by the governor of acts of the legislature, though he holds over, and continues to act as governor after the expiration of his term and after his successor has taken the oath of office, upon the assumption of his re-election in pursuance of the certificate of the State canvassers;<sup>3</sup> the probate of a deed by a deputy clerk who has not taken the oath of office, but who was duly appointed and has assumed the duties;<sup>4</sup> the judgment of a justice of the peace, though he was not duly elected or qualified,<sup>5</sup> or whose term of

Dec. 318; *McGregor v. Balch*, 14 Vt. 428, 89 Am. Dec. 231; *Fowler v. Beebe*, 9 Mass. 231, 6 Am. Dec. 62; *People v. Collins*, 7 Johns. (N. Y.) 551; *Smith v. Bondurant*, 74 Ga. 416, 58 Am. Rep. 438; *Cary v. State*, 76 Ala. 73, 58 Am. Rep. 440, n.; *People v. Staton*, 73 N. C. 546, 21 Am. Rep. 479; *McKinstry v. Tanner*, 9 Johns. (N. Y.) 135; *Gilmore v. Holt*, 4 Pick. (Mass.) 257; *McKim v. Somers*, 1 Penn. 297; *Douglass v. Wickwire*, 19 Conn. 489; *Green v. Burke*, 23 Wend. (N. Y.) 490; *Conover v. Devlin*, 15 How. Pr. 470; *St. Louis County Court v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355; *Gumberts v. Express Co.*, 28 Ind. 181; *Kaufman v. Stone*, 25 Ark. 336; *Eaton v. Harris*, 42 Ala. 491; *Cooper v. Moore*, 44 Miss. 386; *State v. Lewis*, 22 La. Ann. 33; *Johns v. People*, 25 Mich. 498; *Cahill v. Insurance Co.*, 2 Dougl. (Mich.) 124; *Druse v. Wheeler*, 23

Mich. 439; *Stockle v. Silsbee*, 41 Mich. 619; *Morrison v. Sayre*, 40 Hun (N. Y.) 465; *State v. Farrier*, 47 N. J. L. 333; *Chiles v. State*, 45 Ark. 143; *Sharp v. Thompson*, 100 Ill. 447; *Woodside v. Wagg*, 71 Me. 207; *Bliss v. Day*, 68 Me. 201; *People v. Lieb*, 85 Ill. 484; *State v. McJunkin*, 7 S. C. 21; *Peirce v. Weare*, 41 Iowa, 378; *McLean v. State*, 8 Heisk. (Tenn.) 22; *Ex parte Strang*, 21 Ohio St. 610; *Cooper v. Moore*, 44 Miss. 386; *State v. Tolan*, 33 N. J. L. 195; *McCormick v. Fitch*, 14 Minn. 252.

<sup>1</sup> *Shelby v. Alcorn*, 36 Miss. 273, 73 Am. Dec. 169.

<sup>2</sup> *Conway v. City of St. Louis*, 9 Mo. App. 488.

<sup>3</sup> *State v. Williams*, 5 Wis. 306, 63 Am. Dec. 65.

<sup>4</sup> *Farmers & C. Bank v. Chester*, 6 Humph. (Tenn.) 453, 44 Am. Dec. 318.

<sup>5</sup> *Mallet v. Mining Co.*, 1 Nev. 188.



office has in fact expired,<sup>1</sup> where he is acting in the discharge of the office and is generally recognized as the legal officer; a levy made by a constable who is in discharge of the office, though he has not given the required bond;<sup>2</sup> the act of a clerk in marking a paper "filed," after the expiration of his term, but while he is still in the possession of the office;<sup>3</sup> a license issued by a clerk elected and acting, though under Confederate authority;<sup>4</sup> a conviction had,<sup>5</sup> or a recognizance taken,<sup>6</sup> before a regularly acting justice, though he was appointed under an unconstitutional statute,<sup>7</sup> or had forfeited his office by the acceptance of an incompatible one;<sup>8</sup> the service of a legal notice by a constable whose term of office had expired but who was generally supposed to be a constable and was notoriously acting as such;<sup>9</sup> the levy of a tax by a board of supervisors elected and acting but under an unconstitutional statute;<sup>10</sup> the attestation of an affidavit by a notary after the expiration of his term, both parties acting in good faith;<sup>11</sup> a sale for taxes, though made by an officer elected to fill a vacancy unlawfully created.<sup>12</sup>

§ 330. *Title of Officer de Facto can not be questioned collaterally.*—As a necessary postulate from the same principle of public policy from which the rule of the preceding section is deduced is the other rule, equally well settled, that the title of the officer *de facto*, and the validity of his acts, cannot be collaterally questioned in proceedings to which he is not a party, or which were not instituted to determine their validity.<sup>13</sup>

90 Am. Dec. 484. See also Johnson v. McGinley, 76 Me. 433; *Ex parte* Johnson, 15 Neb. 512.

<sup>1</sup> Hamlin v. Kassafar, 15 Oreg. 456, 3 Am. St. Rep. 176.

<sup>2</sup> Gunn v. Tackett 67 Ga. 725; Soudant v. Wadhams, 46 Conn. 218.

<sup>3</sup> Galbraith v. McFarland, 3 Cold. (Tenn.) 267, 91 Am. Dec. 281.

<sup>4</sup> Ward v. State, 2 Cold. (Tenn.) 605, 91 Am. Dec. 270.

<sup>5</sup> State v. Carroll, 88 Conn. 449, 9 Am. Rep. 409.

<sup>6</sup> Brown v. O'Connell, 86 Conn. 432, 4 Am. Rep. 89.

<sup>7</sup> State v. Carroll, *supra*.

<sup>8</sup> Sheehan's Case, 123 Mass. 445, 23 Am. Rep. 374. See also Woodside v. Wagg, 71 Me. 207.

<sup>9</sup> Petersilea v. Stone, 119 Mass. 465, 20 Am. Rep. 335.

<sup>10</sup> Leach v. People, 123 Ill. 420, 36 Alb. L. Jour. 194.

<sup>11</sup> Smith v. Bondurant, 74 Ga. 416, 58 Am. Rep. 438; Cary v. State, 76 Ala. 78, 58 Am. Rep. 440, note.

<sup>12</sup> Watkins v. Inge, 24 Kans. 612.

<sup>13</sup> Plymouth v. Painter, 17 Conn. 585, 44 Am. Dec. 574; Stocklee v. Silsbee, 41 Mich. 615; Johns v. People, 25 Mich. 499; Cahill v. Ins. Co., 2 Doug. (Mich.) 124; Druse v. Wheeler,

§ 331. *De Facto* Officer can not recover Compensation.—But while the acts of the *de facto* officer are thus valid as to third persons, he can not himself acquire rights based upon his defective title.

It is well settled, therefore, that he can not maintain an action to recover the salary, fees or other compensation attached to the office.<sup>1</sup>

"It is the settled doctrine in this State," says the court in New York,<sup>2</sup> "that the right to the salary and emoluments of a public office attach to the true and not to the mere colorable title, and in an action brought by a person claiming to be a public officer, for the fees or compensation given by law, his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency merely gives no right to the salary or compensation."<sup>3</sup>

The right of the intruder to recover is denied, not upon the ground of actual fraud on his part, for it often happens that he is in not under a claim of right, but under a *prima facie* title, which he cannot or may not know to be invalid; nor upon the ground that he is a mere volunteer, and that the government should not be obliged to pay him for his services, for in most cases they are rendered in good faith, and under the expectation, both on his part and on the part of the public, that he is to receive the emoluments of the office. The principle is, that the

*note*

<sup>22</sup> Mich. 439; Kaufman v. Stone, 25 Ark. 336; Eaton v. Harris, 49 Ala. 491; Cooper v. Moore, 44 Miss. 386; Gumberts v. Express Co., 28 Ind. 181; State v. Lewis, 23 La. Ann. 33.

<sup>1</sup> Meehan v. Hudson, 46 N. J. L. 276, 50 Am. Rep. 431; Matthews v. Supervisors, 53 Miss. 715, 24 Am. Rep. 715; Christian v. Gibbs, 53 Miss. 814; Commonwealth v. Shifer, 25 Penn. St. 23, 64 Am. Dec. 630; Riddle v. Bedford County, 7 Serg. & R. (Penn.) 386; Dilton v. Myers, 3 Pa. L. J. 169; Mayfield v. Moore, 53 Ill. 438, 5 Am. Rep. 52; McCue v. Wapello County, 56 Iowa, 698, 41 Am.

Rep. 184; People v. Potter, 63 Cal. 127; Meagher v. Storey County, 5 Nev. 244; Philadelphia v. Given, 60 Penn. St. 136; Kimball v. Alcorn, 45 Miss. 151; People v. Smythe, 28 Cal. 21.

<sup>2</sup> Dolan v. Mayor, 68 N. Y. 274, 28 Am. Rep. 168.

<sup>3</sup> Citing People v. Hopson, 1 Den. (N. Y.) 574; People v. Nostrand, 46 N. Y. 382; People v. Tieman, 30 Barb. (N. Y.) 198; Mayor v. Flagg, 6 Abb. Pr. 296; Lightly v. Clouston, 1 Taunt. 112; Prescott v. Hays, 42 N. H. 56; Riddle v. Bedford County, 7 Serg. & R. 392.

right follows the true title, and the courts will not aid the intruder by permitting him to recover the compensation which rightfully belongs to another."

§ 332. But if Payment is made to Officer *de Facto*, Officer *de Jure* can not recover it from Government.—But it is held that if payment of the salary or other compensation be made by the government, in good faith, to the office *de facto*, while he is still in possession of the office, the government cannot be compelled to pay it a second time to the officer *de jure* when he has recovered the office, at least where the officer *de facto* held by color of title.<sup>1</sup>

"It is plain," says ANDREWS, J., "that in many cases the duty imposed upon the fiscal officers of the State, counties or cities to pay official salaries, could not be safely performed unless they are justified in acting upon the apparent title of claimants. The certificate of boards of canvassers certifying the election of a person to an elective office is *prima facie* evidence of the title of the person whose election is certified. But it often happens that, by reason of irregularities in conducting the election, or the admission of disqualified voters, the apparent title is overthrown and another person is adjudged to be rightfully entitled to the office. But this can seldom, if ever, be ascertained, except after a judicial inquiry; and in case of an appointed officer, the validity of the appointment often depends upon complicated questions of law or fact. If fiscal officers, upon whom the duty is imposed

<sup>1</sup> *Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 882. (COOLEY, J., dissented in a forcible opinion.) *Dolan v. Mayor*, 68 N. Y. 274, 28 Am. Rep. 168; *Commissioner v. Anderson*, 20 Kans. 298, 27 Am. Rep. 171; *Smith v. Mayor*, 87 N. Y. 518; *Conner v. Mayor*, 5 N. Y. 285; *Parker v. Supervisors*, 4 Minn. 59; *McAfee v. Russell*, 30 Miss. 84, 97; *Wheatly v. Covington*, 11 Bush (Ky.) 18, 22; *Queen v. Mayor*, 13 Ad. & El. 80; *Shaw v. Pima County*, — Ariz. —, 18 Pac. Rep. 273; *Selby v. Portland*, 14 Oreg. 243, 53 Am. Rep. 807; *Hannon v. Grizzard*, 96 N. C. 293, 2 S.

E. Rep. 600; *McManus v. Brooklyn*, 5 N. Y. Supplement 424.

But the contrary is held in California: *People v. Smythe*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 198.

In *Matthews v. Supervisors*, 53 Miss. 715, 24 Am. Rep. 715, the court per CHALMERS, J., approve the dissenting opinion of COOLEY, J., in *Auditors v. Benoit*, *supra*.

See also *Philadelphia v. Rink*, — Penn. —, 2 Atl. Rep. 505, and *Andrews v. Portland*, 79 Me. 434, 10 Atl. Rep. 453.

to pay official salaries, are only justified in paying them to the officer *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making the payment, to go behind the commission and investigate and ascertain the real right and title. This, in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer *de jure*, without inquiring whether another has the better right."<sup>1</sup>

§ 333. *De Jure Officer may recover Salary paid de Facto Officer.*—But it is held that the *de jure* officer, when he has established his title and gained possession of his office, may recover from the *de facto* officer who has wrongfully held possession of it, the salary, fees or other emoluments received by the latter while holding the office.<sup>2</sup> In an Illinois case, where the *de facto* officer had held in good faith, the court permitted him to deduct "a reasonable allowance for the necessary expenses in earning the fees and emoluments;" but said that had he intruded without pretense of legal right, a different rule would have been applied.<sup>3</sup> In Michigan, one who had been wrongfully kept out of the office by a claimant thereto was permitted to recover from

<sup>1</sup> In *Dolan v. Mayor*, *supra*.

<sup>2</sup> *Nichols v. MacLean* (1886) 101 N. Y. 536, 54 Am. Rep. 730; *Kessel v. Zeiser*, 102 N. Y. 114, 55 Am. Rep. 769; *People v. Nolan*, 101 N. Y. 569; *Rule v. Tait*, 38 Kan. 765; *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 53; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Glasscock v. Lyons*, 20 Ind. 1; *Currey v. Wright*, 9 Lea (Tenn.) 247; *Bier v. Gorrell*, 30 W. Va. 95; *Stoddard v. Williams*, 65 Cal. 473; *Hunter v. Chandler*, 45 Mo. 452; *Comstock v. Grand Rapids*, 40 Mich. 397; *United States v. Addison*, 6 Wall. (U. S.) 291; *Dorsey v. Smyth*,

28 Cal. 21; *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168; *Douglass v. State*, 31 Ind. 429; *Petit v. Rousseau*, 15 La. Ann. 239; *Sigur v. Crenshaw*, 10 La. Ann. 297; *Vaux v. Jeffereen*, 2 Dyer 114; *Pybus v. Milford*, 1 Mod. 122; *Howard v. Wood*, 2 Lev. 245; *Arris v. Stukeley*, 2 Mod. 260; *Lee v. Drake*, 2 Salk. 468; *Boyter v. Doda-worth*, 6 T. R. 681; *Webb's Case*, 3 Cokes' Rep. 90; *Green v. Hewett*, Peake 182; *Crosbie v. Hurley*, 1 Alcock & Nap. 431.

<sup>3</sup> *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52.

the latter the whole official salary, without any deduction for the services of the incumbent.<sup>1</sup>

In New Jersey, however, the right of the *de jure* officer, who has ousted a *de facto* officer holding in good faith, to recover from the latter the fees of the office received by him, is denied, especially where the *de facto* officer would have been subject to a penalty for not accepting the office. The cases, cited in the note, from California, Indiana, Michigan, Louisiana and New York, were distinguished upon the ground that the statute in those States expressly permits one who has recovered the office to also recover the damages he had sustained by reason of the usurpation.<sup>2</sup>

So the officer *de jure* may not recover the salary paid to one who was appointed to fill the vacancy caused by the resignation of an officer who had been held to be entitled to it, though this finding was afterwards reversed and the plaintiff held to have the true title.<sup>3</sup>

§ 334. **De Jure Officer can not recover on Bond of de Facto Officer.** But though the *de jure* officer may thus recover of the officer *de facto*, the damages sustained by reason of the intru-

<sup>1</sup> *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 181.

<sup>2</sup> *Stuhr v. Curran*, 15 Vroom (N. J.) 181, 43 Am. Rep. 353, BRASLEY, O. J., delivered an elaborate dissenting opinion holding the right of recovery. See also the subsequent case of *Meehan v. Hudson*, 46 N. J. L. 276, 50 Am. Rep. 421, where the court say of *Stuhr v. Curran*: "It was not the design of the judgment in the Court of Errors, nor is it its legitimate effect, to give countenance or encouragement to those who are willing by force or fraud to obtrude in places lawfully assigned to others, nor to permit such person to profit by the emoluments belonging thereto. The reasons which protect one who has performed the services belonging to a public officer, under an appointment apparently regular and legal, in

ignorance of and without the means of ascertaining, defects in his title, and where his refusal to serve would leave a vacancy in office, whether such reasons be weak or strong, have no application to a case like this. In such a case we cannot doubt that in some form the officer *de jure* would be entitled in law to demand and have compensation for the injury done him by such an intruder. If payment be made to the officer *de facto* the public will be protected from further claim, as the disbursing officer is not bound to know the title by which an actual incumbent holds, and the rival claims to the funds must be litigated between the individual claimants."

<sup>3</sup> *Nichols v. Branham*, 84 Va. 923, 6 S. E. Rep. 463.

sion, the sureties upon the bond of the *de facto* officer are not liable. "A careful review of the cases," it is said in a late case in Tennessee, "leads to the conclusion that, whether the action be for the recovery of specific salary due and uncollected by the usurper, or fees earned and unappropriated, or for damages *eo nomine*, the action is but an action for damages, and is a personal action against the intruder," and it was held that the sureties upon the officer's bond for the faithful performance of his duty were not liable.<sup>1</sup>

§ 335. Public can not recover Salary voluntarily paid to Officer *de Facto*.—But the public cannot recover, as paid under a mistake of law, money paid as salary to one who if not an officer *de jure* has acted as an officer *de facto*.<sup>2</sup>

§ 336. Officer *de Facto* liable for Malfeasance.—"A person who undertakes an office and is in office," says Chief Justice RUFFIN, "though he might not have been duly appointed, and, therefore, may have a defeasable title or not have been compellable to serve therein, is yet, from the possession of its authorities and the enjoyment of its emoluments, bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal and his right perfect."<sup>3</sup>

It is, therefore, held that the officer *de facto* is criminally liable for malfeasance in his assumed office,<sup>4</sup> and he may be subjected to a penalty prescribed for a violation of his duty.<sup>5</sup> He must also respond in damages at the suit of him who is injured thereby.<sup>6</sup> By assuming the office and undertaking to exercise it, he estops himself from denying that he is legally chargeable with its due performance.<sup>7</sup>

§ 337. May be punished for Embezzlement.—So the officer

<sup>1</sup> Curry v. Wright, 86 Tenn. 636.

<sup>2</sup> Badeau v. United States, 180 U. S. 439, 9 S. C. Rep. 579.

<sup>3</sup> Diggs v. State, 49 Ala. 311; State v. Long, 76 N. C. 254; State v. Cansler, 75 N. C. 442; Neale v. Overseers, 5 Watts (Penn.) 538; State v. Goss, 69 Me. 23.

<sup>4</sup> Bedford v. Rice, 58 N. H. 446.

<sup>5</sup> Allen v. Archer, 49 Me. 346; Bearce v. Fossett, 84 Me. 575; Long-

acre v. State, 3 Miss. 637; Sandwich v. Fish, 2 Gray (Mass.) 298; Williamstown v. Willis, 15 Gray (Mass.) 427; Johnston v. Wilson, 2 N. H. 202; Horn v. Whittier, 6 N. H. 88; Jones v. Scanland, 6 Humph. (Tenn.) 195; Prescott v. Moan, 50 Me. 347; Wentworth v. Gove, 45 N. H. 160.

<sup>6</sup> Billingsley v. State, 14 Md. 369; Borden v. Houston, 2 Tex. 594.

*de facto*, who has assumed the office and received money by virtue of it, is an officer within the meaning of the statutes punishing embezzlement.<sup>1</sup>

§ 338. **Must respond for his Negligence.**—An officer *de facto* is also liable civilly in damages to individuals who have received injury from his negligent omission or performance of a duty owing to them by reason of the office which he has assumed to exercise.<sup>2</sup>

In this respect he stands in much the same position as an agent who has gratuitously undertaken the performance of a service, and is held bound to conform to the instructions he receives.<sup>3</sup>

§ 339. **May be required to act, by Mandamus.**—Having assumed the office, the officer *de facto* must perform the duties adhering to it, and the performance of them may be enforced by mandamus.<sup>4</sup>

§ 340. **But Officer de Facto incurs no Liability by ceasing to act.**—But the officer *de facto* is not bound to remain in the office or to continue to exercise its functions, and hence he will not, in general, incur liability to individuals,<sup>5</sup> or become subject to a statutory penalty<sup>6</sup> for omitting to act further when he expressly disavows his authority and ceases to act because he is doubtful of his right to do so.

“Yet perhaps,” said Mr. BISHOP, “in special circumstances, as where the refusal is to take a particular step constituting a part of a whole which he has taken upon himself to do, his not doing of the part, when he might have declined the whole, will subject him to punishment.”<sup>7</sup>

§ 341. **Is liable upon his Bond.**—As has previously been stated, the sureties upon an official bond, by virtue of which the officer has been inducted into office, can not, when called upon to answer for his official defaults, escape liability upon the ground

<sup>1</sup> State v. Goss, 69 Me. 42; Fortenberry v. State, 56 Miss. 286.

<sup>2</sup> Longacre v. State, 3 Miss. 687.

<sup>3</sup> See Mechem on Agency, § 478.

<sup>4</sup> Runion v. Latimer, 6 Rich. (S. C.)

126; Kelly v. Wimberly, 61 Miss. 548.

<sup>5</sup> Olmsted v. Dennis, 77 N. Y. 378.

<sup>6</sup> Bentley v. Phelps, 37 Barb. (N. Y.) 524.

<sup>7</sup> 1 Crim. Law (7th ed.) § 464.

that their principal was not eligible or was not properly elected or did not qualify in the prescribed manner.<sup>1</sup>

§ 342. When he sues or defends in his own Right must show valid Title.—But though the acts of the *de facto* officer are valid as respects the rights of third persons, they are void as to himself.<sup>2</sup> He can not, therefore, as has been seen, build up rights in himself based upon his occupancy of the office, as, for example, the right to recover the salary;<sup>3</sup> neither can he, when sued for acts, which only a valid title to the office will justify, escape liability as a trespasser by showing himself to be the officer *de facto*. Unless he can show himself to be the officer in law as well as in fact, authorized as such to do the act complained of, he will be liable as any other trespasser.<sup>4</sup>

§ 343. His Title can not be tried collaterally.—As has been seen in an earlier section, the title of the officer *de facto* can not be tried collaterally, but only in a direct proceeding brought to determine that very question.<sup>5</sup>

§ 344. Quo Warranto is the Remedy.—In this, as in other cases where it is desired to try the title to the office, *quo warranto* is the remedy to be applied, unless a special statutory remedy has been substituted in its place.<sup>6</sup>

§ 345. Injunction will not lie to prevent his acting.—Injunction, therefore, will not lie to prevent the officer *de facto* from continuing to exercise the functions of the office.<sup>7</sup>

<sup>1</sup> See *ante*, § 296, and cases cited. See also *Case v. State*, 69 Ind. 46.

<sup>2</sup> *Olmsted v. Dennis*, 77 N. Y. 877; *Riddle v. Bedford County*, 7 Serg. & R. (Penn.) 886; *People v. Hopson*, 1 Den. (N. Y.) 574; *Hamlin v. Dingman*, 5 Lana. (N. Y.) 61; *People v. Nostrand*, 46 N. Y. 875; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730.

<sup>3</sup> *Ante*, § 331.

<sup>4</sup> *People v. Weber*, 89 Ill. 347; *People v. Weber*, 86 Ill. 283; *Miller v. Callaway*, 83 Ark. 666, citing *Patterson v. Miller*, 3 Met. (Ky.) 493; *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 239; *People v. Hopson*, 1 Den. (N.

Y.) 574; *Green v. Burke*, 23 Wend. (N. Y.) 490; *Riddle v. Bedford County*, 7 Serg. & R. (Penn.) 886; *Keyser v. Commissioners*, 3 Rawle (Penn.) 139; *Fowler v. Beebe*, 9 Mass. 231, 6 Am. Dec. 62; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730.

<sup>5</sup> See *ante*, § 330. See also *Hagner v. Heyberger*, 7 Watts & S. (Penn.) 104, 42 Am. Dec. 220.

<sup>6</sup> *Hagner v. Heyberger*, 7 Watts & S. (Penn.) 104, 42 Am. Dec. 220; *Bean v. Thompson*, 19 N. H. 290, 49 Am. Dec. 154.

<sup>7</sup> *Hagner v. Heyberger*, 7 Watts & S. (Penn.) 104, 42 Am. Dec. 220.



§ 346. **Mandamus will not lie to install Officer de Jure.**—So where an office is already filled by an officer *de facto* who is discharging its duties, mandamus will not lie to compel the admission of one claiming to be the officer *de jure*, but resort must be had to *quo warranto*.<sup>1</sup>

<sup>1</sup>Duane v. McDonald, 41 Conn. 517.

## CHAPTER IX.

### OF THE VALIDITY OF CONTRACTS CONCERNING OFFICES AND OFFICERS.

§ 347. Purpose of this Chapter.

348. The Doctrine of Public Policy.

349. Contracts opposed to Public Policy are void.

I. CONTRACTS TO SECURE APPOINTMENTS OR ELECTION TO OFFICE.

350. Agreements to appoint one to Office are void.

351. Contracts to procure Appointment to Office are void.

352. Same Rule applies to private Offices and Employments.

353. Contracts for procuring or improperly influencing Elections are void.

354. Same Subject—What Services are legitimate.

355. Contracts diminishing Competition for Offices are void.

II. CONTRACTS FOR THE SALE OF OFFICES.

356. Contracts for the Sale of Public Offices are void.

357. Contracts to resign Office in another's Favor are void.

358. Contracts for Exchange of Offices are void.

III. CONTRACTS FOR INFLUENCING OFFICERS AND OFFICIAL ACTION.

359. Contracts for improperly influencing official Action are void.

360. Contract to improperly influence legislative Action are void.

§ 361. Same Subject—Legitimate Services.

362. Procuring Contracts from Government or Heads of Departments.

363. Same Subject—Illustrations.

364. Contracts to procure Allowance of Claims.

365. Contracts to procure Compromise of Crime or Discontinuance of criminal Proceedings.

366. Contracts for procuring Pardons.

367. Same Subject—How where Conviction illegal.

368. Contracts leading to Violation of Duty are void.

369. Contracts imposing Restraints upon Performance of Duty are void.

IV. CONTRACTS RESPECTING THE EMOLUMENTS OF PUBLIC OFFICERS.

370. Contract that Stranger shall receive all of the Emoluments is void.

371. Contract that Stranger shall receive Part of the Emoluments is void.

372. Contract to surrender all or Part of Emoluments to the Public is void.

373. And Election procured by such Contract is void.

374. Contracts to pay additional Compensation for Performance of Duty are void.

§ 375. Contract to pay for Services in independent Employment is valid.

376. Contract to pay Reward for Performance of official Duty not valid.

377. Contract to accept Less than legal Compensation is not binding.

378. Contract to waive legal Means for collecting Compensation is void.

V. CONTRACTS RESPECTING DIVISION OF FEES WITH DEPUTIES.

§ 379. Where all Fees belong to Principal he may contract for Portion of those earned by Deputy.

380. But Contract to pay Principal a fixed Sum at all Events is void.

381. Where Fees legally belong to Deputy, Contract to divide these is void.

§ 347. Purpose of this Chapter.—No discussion of the subject of this treatise can be complete which does not deal to some extent with the question of the validity of the contracts which may be made concerning public offices and officers, and this seems to be an appropriate place for it.

It is not the purpose to discuss those questions which are common to all contracts by whomsoever entered into, but simply those which stand upon some ground peculiar to the general subject. Of this class, the question most frequently arising is that which finds its source in the principles of public policy.

§ 348. The Doctrine of Public Policy.—By “public policy,” says a writer upon that subject, is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law.<sup>1</sup>

§ 349. Contracts opposed to Public Policy are void.—The application of this principle is well stated by Chief Justice BRIDGELL in a recent case,<sup>2</sup> as follows: “All agreements or contracts, having for their object that which is repugnant to public justice, or violative of public policy, or offensive to good morals, or contrary to statutory provisions, or in derogation of the principles of the common law relating to the public peace or security, and injurious to the community, are void; ‘and the reason

<sup>1</sup> Greenhood on Pub. Pol. 2. quoting Lord Brougham in Egerton v. Brownlow, 4 H. L. Cas. 1.

<sup>2</sup> Robertson v. Robinson, 65 Ala. 610, 39 Am. Rep. 17.

why the common law says such contracts are void is for the public good.' ”

Distributing this matter under several heads, there will be considered—

## I.

### CONTRACTS TO SECURE APPOINTMENT OR ELECTION TO OFFICE.

§ 350. Agreement to appoint one to Office void.—“It is the duty of the officer having a power of appointing,” says LEARNED, P. J., “to make the best appointment in his power according to his judgment *at the time when he makes the appointment*. The public have a right to demand this. And it is against public policy that he should be deprived of the exercise of his best judgment by a contract previously made. If he has promised the office to one person and has since discovered that the public will be better served by another, he must be at liberty to make the better appointment. And that too, although no such absolute disqualification may exist in regard to the person to whom it was first promised, as would form a defense to an action for damages, if such an action could be maintained on the promise. Whatever may be the practice, appointments are in theory made for the public good. That is the reason why the appointee may not purchase his office. In a similar way, though not to the same extent, the public good would be injured if a promise to make an appointment were held to be legally binding, so as to control the exercise of that judgment which the appointing officer ought to exercise when he makes an appointment. This is not a question as to the lawfulness of arrangements between the sheriff and his deputies as to their fees. The fees may be his. But the right of appointment is not the property of the appointing officer. And he has no right to barter it, or to dispose of it. It is merely a political power entrusted to him, to be exercised, not to be sold.”

§ 351. Contracts to procure Appointment to Office are void.—Contracts to procure the appointment of a person to public

<sup>1</sup> In *Hager v. Catlin*, 18 Hun (N. Y.) 448. In this case the sheriff of the county had agreed to appoint the plaintiff one of the deputies.

office fall within the same principles. These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power must necessarily lower the character of the appointments to the great detriment of the public good. Agreements for compensation to procure these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy.<sup>1</sup>

§ 352. Same Rule applies to private Offices and Employments.

—The same principles apply to contracts to procure private offices and employments, as well as those which are public or political in their nature. Open and fair presentation of an applicant's qualifications for the position is legitimate, and such presentation may lawfully be undertaken for a compensation, where the agent's relations to the subject-matter and the appointing power will permit, and the fact that he comes as a hired advocate is disclosed.

But where it is contemplated that the agent is to conceal his agency and assume the position of a disinterested friend or adviser;<sup>2</sup> or where the appointment is to be sought by bringing

<sup>1</sup> *Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Gray v. Hook*, 4 N. Y. 449; *Gaston v. Drake*, 14 Nev. 175, 88 Am. Rep. 548; *Filson v. Himes*, 5 Penn. St. 452, 47 Am. Dec. 422; *Faurie v. Morin*, 4 Martin (La.) 89, 6 Am. Dec. 701; *Outon v. Rhodes*, 8 A. K. Marsh. (Ky.) 482, 18 Am. Dec. 193; *Hager v. Catlin*, 18 Hun (N. Y.) 448; *Haas v. Fenlon*, 8 Kans. 601; *Liness v. Hesling*, 44 Ill. 113, 92 Am. Dec. 153.

<sup>2</sup> See *Bollman v. Loomis*, 41 Conn. 581, where A. for a fee from C. undertook to pose as the confidential friend and adviser of B. and thus induce him to purchase property of C.

"This," says Chief Justice SHAW,

in *Fuller v. Dame*, 18 Pick. (Mass.) 473, in speaking of this rule, "is founded upon the general consideration of fitness and expediency. Such advice and solicitation, in whatever form the agency may be exerted, are understood to be disinterested and to flow from a single regard to the interests of the parties. They are lawful only so far as they are free and disinterested. If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce all the consequences of absolute misrepresentation and falsehood. It is understood to be the offer of

to bear personal influence or persuasion;<sup>1</sup> or where the undertaking of the commission at all is inconsistent with duties already assumed or imposed by law, the contract is repugnant to the public policy.<sup>2</sup>

Thus where A, an attorney, employed B, the agent of C, to endeavor to persuade C to discharge a certain other attorney he was then employing, and to employ A instead, and promised B, by way of compensation, to divide with him such fees as A might receive, it was held that the agreement was void.<sup>3</sup> So a contract that in consideration of B's purchasing of A certain stock in a corporation, A would procure B's appointment as treasurer<sup>4</sup> or cashier<sup>5</sup> thereof, is void. Such appointments should be made because of the personal fitness of the applicant, and not because the appointing power is open to personal influence or can be bought for a price. So A, who has been requested to recommend to C, a suitable person for employment whom he could endorse as in every way responsible and reliable, cannot lawfully undertake to secure the position for B in consideration of B's paying him a fee.<sup>6</sup>

§ 353. **Contracts for procuring or improperly influencing elections are void.**—Purity of elections, and the free, fair and intelligent exercise of the ballot, uninfluenced by other considerations than the candidate's fitness and the general good of the

disinterested good offices, and the measure proposed, to be recommended by the unbiased judgment of the person offering it; whereas, it is in fact an offer flowing from unavowed motives of pecuniary interest, and the recommendation is the result of a judgment biased by a hope of a large reward. If rewards might be taken in consideration of the exertion of direct or indirect influence, either by the person acting under it, or by others who should be influenced and moved by him, it would destroy all confidence, it would lead to false and unfair representations and dealings, and be productive of infinite mischief."

<sup>1</sup> See note 3, *post*.

<sup>2</sup> See note 3, 4 and 5, *post*.

<sup>3</sup> *Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442; *Meguire v. Corwine*, 101 U. S. 108.

<sup>4</sup> *Guernsey v. Cook*, 120 Mass. 501; *Noyes v. Marsh*, 123 Mass. 286; *Jones v. Scudder*, 2 Cin. Sup. Ct. 178.

<sup>5</sup> *As of a National Bank*, *Noel v. Drake*, 23 Kana. 265, 42 Am. Rep. 162; see also *Railroad Co. v. Ryan*, 11 Kana. 602; *Haas v. Fenlon*, 8 Kana. 601; *Tool Co. v. Norris*, 2 Wall. (U. S.) 45.

<sup>6</sup> *Holcomb v. Weaver*, 136 Mass. 285, 17 Reporter, 401.

community, are of paramount public importance, and any agreement for the rendition of services which have for their object, or which legitimately tend to, the introduction of other elements, as the bribery of voters or the bringing to bear upon them of personal influence, solicitation or persuasion, is, in accordance with the principles already referred to, clearly opposed to public policy and void.

Thus where one who was a candidate for the office of district attorney, employed another to "use all of his influence" with the voters of the county to secure the candidate's election, and who promised as compensation therefor, that if he should be elected, he would divide the fees of the office with the other, the court said: "Such a contract cannot be upheld. Its tendency was to corrupt the people upon whose integrity and intelligence the safety of the State and Nation depends,—to lead voters to work for individual interests rather than the public welfare."<sup>1</sup>

So where one agreed to render services in procuring the election of a certain candidate to the office of sheriff upon consideration that if successful he should be appointed deputy, the court held the agreement void.<sup>2</sup> And where one for money or other personal profit, agrees to use his influence in an election against what he believes to be for the public good, the contract is void, though as a matter of fact, he uses no unlawful means.<sup>3</sup>

§ 354. *Same Subject—What Services legitimate.*—But it is not unlawful for a candidate for a public office, particularly where his candidacy extends over a considerable territory, to employ another to make public speeches in his behalf, or to prepare, print or distribute arguments upon the questions at issue, or to use other open and honorable means to promote the success of his candidacy, where the object is to convince the understandings of the voters by public means and not to bring personal or

<sup>1</sup> *Gaston v. Drake*, 14 Nev. 175, 88 Am. Rep. 548; *Martin v. Wade*, 87 Cal. 168; see also *Swayze v. Hull*, 8 Halstead (N. J.) 54, 14 Am. Dec. 399. An agreement to pay another to "work and canvass" voters for the purpose of securing the promisor's nomination for an office is void. *Keating v. Hyde*, 38 Mo. App. 555.

<sup>2</sup> *Stout v. Ennis*, 28 Kans. 706. And a like ruling was made in *Robertson v. Robinson*, 65 Ala. 610, 39 Am. Rep. 17. See also *Salling v. McKinney*, 1 Leigh (Va.) 42, 19 Am. Dec. 732; *Groton v. Waldoborough*, 11 Me. 306, 26 Am. Dec. 530.

<sup>3</sup> *Nichols v. Mudgett*, 32 Vt. 546.

other improper influences to bear upon their weaknesses or prejudices.<sup>1</sup>

§ 355. **Contract diminishing Competition for Office is void.**—Contracts by which open and honorable competition for appointment or election to public office is diminished, discouraged or removed, are opposed to public policy, as having a tendency, among other things, to deteriorate the public service and to prevent the selection of the best candidates. An agreement, therefore, that, if one of two candidates for appointment will withdraw, the other will, if successful, pay him half of the fees of the office is void and will not be enforced.<sup>2</sup>

## II.

### CONTRACTS FOR THE SALE OF OFFICES.

§ 356. **Contracts for the Sale of public Offices are void.**—“By the theory of our government,” says AMES, C. J.,<sup>3</sup> “all offices, whether civil or military, whether general or professional, are trusts held solely for the public good, and in which no man can have a property to sell, or can acquire one by purchase. Appointments to them are presumed to be made solely upon the principle of *detur digniori*; and the office is to be borne by the appointee for the public good, as long as his services are required in it; and any practice whereby the bare consideration of money is brought to bear in any form upon such appointment to or

<sup>1</sup> “There is a clear distinction,” says LEWIS, P. J. in *Keating v. Hyde*, 28 Mo. App. 555, “between the purchase of services to be devoted only to an advertising of the fact that one is or desires to be a candidate, and the purchase of services to be employed in advocating his peculiar merit and eligibility so as to influence the choice of the voter. No public policy forbids the making of compensation, under agreement or otherwise, for printing or distributing announcements, or for the employment of any proper agency which may bring the

fact of a person's candidacy more prominently before the public eye. The information thus disseminated is essential to the intelligent determination of the voter's choice. But it becomes a very different thing when money is paid or promised for efforts to control the voter's free agency in selecting the object of his suffrage.” See also *Murphy v. English*, 64 How. Pr. (N. Y.) 363.

<sup>2</sup> *Gray v. Hook*, 4 N. Y. 449; *Hunter v. Nolf*, 71 Penn. St. 283.

<sup>3</sup> In *Eddy v. Capron*, 4 R. I. 394, 67 Am. Dec. 541, citing *Ellis v. Ruddle*,



resignation of office, conflicts with and degrades this great principle and policy. The services performed under such appointments are paid for by salary or fees, presumed to be adjusted by law to the precise point of adequate remuneration for them. Any premium paid to obtain office, other than that which the law establishes or regulates, interferes with this adjustment, and tempts to speculation, overcharges and frauds in the effort to restore the balance thus disturbed. In short, without dwelling longer upon so obvious a policy as that involved in such transactions, the moral sense of every person educated in a free country anticipates all reasonings upon such a subject, and, as it were, instinctively condemns all agreements impugning this policy as at war with the whole theory of our government."

Such sales of and traffickings in public offices are usually forbidden by express statute, but the principles of the common law alike declare them void.

§ 357. **Contracts to resign Office in another's Favor are void.**—In accordance with these principles, a contract is void, as against public policy, whereby a public officer agrees to resign his office in another's favor or to give another a chance of promotion or appointment to the office.<sup>1</sup>

2 Lev. 151; Graeme v. Wroughton, 23 Eng. L. & Eq. 561; Meredith v. Ladd, 2 N. H. 517; Carleton v. Whitcher, 5 N. H. 196, 200; Outon v. Rodes, 3 A. K. Marsh (Ky.) 432, 18 Am. Dec. 193; Tappan v. Brown, 9 Wend. (N. Y.) 175; Gray v. Hook, 4 N. Y. 449; Becker v. Ten Eyck, 6 Paige (N. Y.) 68; Hopkins v. Prescott, 4 M. G. & S. 578, 56 Eng. Com. L. 578, 596; Harrington v. Du Chatel, 1 Bro. C. C. 124; Parsons v. Thompson, 1 H. Black, 322.

Sale of a public office is void, but purchaser being *in pari delicto* can not recover the money paid. Groton v. Waldborough, 11 Me. 306, 26 Am. Dec. 530.

<sup>1</sup> A draft drawn in consideration of the resignation of an officer in the drawer's favor is void, although there

was no promise to recommend the drawer's appointment, and although the resigning officer had already resolved to remove to another State, and merely wished to get back money previously paid by him to the drawer for resigning the same office in his favor. Eddy v. Capron, 4 R. I. 394, 67 Am. Dec. 541. So a bond given to secure repayment of money for buying resignation of an officer that there might be a promotion, is void. Graeme v. Wroughton, 11 Excheq. 146, 23 Eng. L. & Eq. 561. So is an agreement to secure an officer half pay for life in consideration of his retiring from service. Parsons v. Thompson, 1 H. Black, 322, and a note given in consideration of a resignation. Outon v. Rodes, 3 A. K. Marsh (Ky.) 432, 18 Am. Dec. 193.

§ 358. **Contracts for Exchange of Office are void.**—For like reasons, also, a contract by which one agrees to pay another officer a sum of money if he will exchange offices with him is void.<sup>1</sup>

### III.

#### CONTRACTS FOR INFLUENCING OFFICERS AND OFFICIAL ACTION.

§ 359. **Contracts for improperly influencing official Action are void.**—It is an obvious principle of public policy that public officers in determining upon and pursuing any course of official action or conduct should be influenced and guided only by considerations of the public welfare and a desire to faithfully, honestly and impartially perform their official duty. Any contract or undertaking, therefore, which has for its purpose or legitimately tends to substitute for these considerations those which are based upon the personal weakness, obligations, friendship or cupidity of the officer are clearly opposed to public policy and void. Thus—

§ 360. **Contracts to improperly influence legislative Action are void.**—It is of the utmost importance to the preservation and protection of the State that the sources of its legislative enactments be kept uncontaminated by any improper or debasing influence. Considerations of the public good, motives of high policy, arguments based solely upon the true interests of the people, are the only elements which can properly enter into the question of the right discharge of the important functions of the legislator. Personal solicitation, private intrigue, secret persuasion, arguments based upon the legislator's duty or obligations to individuals or societies or parties, to say nothing of offers of personal or pecuniary profit or advancement, are utterly hostile to the public good. Courts of law and equity have not been slow to recognize this evil, or to declare that all attempts to influence the course of legislation by secret or sinister means, or even by using personal influence, solicitation or persuasion with the

Same rule applies in case of office of a corporation. *Forbes v. McDonald*, 54 Cal. 98. <sup>1</sup> *Stroud v. Smith*, 4 Houst. (Del.) 448.

members of the legislative body, are inconsistent with sound public policy.

Any contract, therefore, for services to be performed in procuring or attempting to procure the passage or defeat of any public or private act by the use of any improper means or the exercise of undue influence, or by using personal solicitation, influence or persuasion with the members is void;<sup>1</sup> and any agree-

<sup>1</sup> *Clippinger v. Hepbaugh*, 5 Watts & Serg. (Penn.) 815, 40 Am. Dec. 519; *Marshall v. Baltimore & Ohio R. R. Co.*, 16 How. (U. S.) 314; *Tool Co. v. Norria*, 2 Wall. (U. S.) 45; *Trist v. Child*, 21 Wall. (U. S.) 441; *Weed v. Black*, 2 McArthur (D. C.) 268, 29 Am. Rep. 618; *McBratney v. Chandler*, 22 Kan. 693; *Kansas Pacific Ry. Co. v. McCoy*, 8 Kan. 538; *Harris v. Simonson*, 28 Hun (N. Y.) 318; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Frost v. Belmont*, 6 Allen (Mass.) 152; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746; *Oscanayan v. Arms Co.*, 103 U. S. 261; *Sweeney v. McLeod*, 15 Oreg. 330; *Cary v. Western Union Tel. Co.*, 47 Hun (N. Y.) 610.

In *Trist v. Child*, *supra*, Mr. Justice SWAYNE well says, "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of universal history. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting

upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

"The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interests of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

"If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every

ment for the payment of a fee for such services is likewise void,<sup>1</sup> particularly where it is made contingent upon success, because in such a case there would be a stronger incentive to the exercise of personal and sinister means to effect the object.

And so jealously do the courts scrutinize such contracts that they condemn the very appearance of evil, and it matters not that in the particular case nothing improper was done or was expected to be done. It is enough that the employment tends directly to such results.<sup>2</sup>

right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

"If the instances were numerous, open and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their

presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

"It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views we follow the lead of reason and authority."

<sup>1</sup> *Clippinger v. Hepbaugh*, 5 Watts & Serg. (Penn.) 815, 40 Am. Dec. 519; *Wood v. McCann*, 6 Dana (Ky.) 386; *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 787.

<sup>2</sup> *Clippinger v. Hepbaugh*, *supra*; *Mills v. Mills*, *supra*; *McKee v. Cheney*, 53 Howard, Pr. (N. Y.) 144; *Gil v. Williams*, *supra*; *Powers v. Skinner*, *supra*; *Atcheson v. Mallon*,

§ 861. **Same Subject—Legitimate Services.**—It is not to be understood, however, that every contract for services to be rendered in endeavoring to procure or defeat legislation is unlawful. Services may be rendered, public in their nature and intended to reach the understandings of the legislators rather than to exercise any personal influence over them, which are perfectly legitimate.

Thus a person may lawfully be employed to draft a petition, attend the taking of testimony, collect facts, prepare arguments and to submit them publicly, either before a committee of the legislature or the legislature itself, if permitted to do so, "because," as it is said by a learned judge, "a public discussion could not tend to deceive or corrupt the legislature, while personal solicitation and influence might produce that result."<sup>1</sup>

§ 862. **Procuring Contracts from Government or Heads of Departments.**—Employments of this nature rest upon the same principles as those considered in the preceding section. It is legitimate and proper to lay before the officer having the matter in charge, facts, information and arguments intended for the public good and calculated to enlighten the understanding and secure wise and intelligent action. Parties desiring to furnish to the government its necessary supplies, or to undertake the performance of its public works, may lawfully employ an agent to present their bids or offers; to call attention to their facilities for the proper performance of their undertakings, and to make, in

48 N. Y. 147, 8 Am. Rep. 678; *Spence v. Harvey*, 23 Cal. 887; *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 869.

"It matters not," says ROGERS, J. in *Clippinger v. Hepbaugh*, *supra*, "that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous

secret influence over an important branch of the government. It may not corrupt all; but if it corrupts, or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal."

<sup>1</sup> *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55; *Trist v. Child*, 21 Wall. (U. S.) 441; *Sedgwick v. Stanton*, 14 N. Y. 289; *Wilkey v. Collier*, 7 Md. 278; *Miles v. Thorne*, 33 Cal. 335, 99 Am. Dec. 384; *Coquillard v. Beams*, 21 Ind. 479, 38 Am. Dec. 363.

their behalf, such public and open arguments in favor of their propositions as they may be afforded opportunity.'

'*Trist v. Child*, 21 Wall, (U. S.) 441; *Stanton v. Embrey*, 98 U. S. 548; *Lyon v. Mitchell*, 86 N. Y. 235, 98 Am. Dec. 502; *Pease v. Walsh*, 49 How. Pr. (N. Y.) 269; *Southard v. Boyd*, 51 N. Y. 177; *Cummins v. Barkalow*, 4 Keyes, (N. Y.) 514; *Howland v. Coffin*, 47 Barb. (N. Y.) 658.

Thus in *Beal v. Polhemus*, 67 Mich. 180, 84 N. W. Rep. 583; *Polhemus* gave *Beal* a note to be paid "as soon as the postoffice is moved into" a building which *Beal* was then erecting on property near that belonging to *Polhemus*, the latter believing that its location there would enhance the value of his own property. *Beal* was an active and prominent politician, but while there was some evidence that he had said in relation to similar contracts with other parties that he could control the senators from his State, there was no evidence that he made any such representations to *Polhemus*, or that the using of any such influence constituted any part of the consideration of the contract. The postoffice was duly moved into the building, but *Polhemus* refused to pay the note, alleging it to be invalid as against public policy. In an action to recover upon it the trial court found as a fact that in securing the postoffice to be placed and located in his building, *Beal* used no undue influence upon any department or officers of the government, and was not guilty of any corruption or corrupt practice in making the contract, and did no more than any honorable man might do in renting his building to the government for the use of a post-office, and he was allowed to recover. In the Supreme Court, *MORSE, J.*

said: "Mr. *Beal* had a perfect right to be heard before any officer of the government or any department of the same, as to the merits of his building as a place for the location of the post-office. It is not shown by the findings or the evidence in the case that he used any improper means to gain his point, or even that he influenced any senator or representative in Congress, or any officer of the government, to interfere in his behalf. He went to Washington personally, and, while there, secured the location of the office where he wanted it; but there is not the slightest testimony that he used any undue means to accomplish his end. We can not presume that he used his personal power, which is said to have been very great, in a corrupt or unseemly manner, or in violation of any public policy. For aught we know, he appeared as any citizen might and has a right to do, before the proper office at Washington, and stated the merits of his claim so convincingly and conclusively that the location desired seemed to be the most proper and available one. Certainly there could be nothing wrong in this. It is true, there is evidence in relation to some of the contracts, not in suit, that *Beal* boasted that he could control the senators from this State, and that he must have money to go to Washington to do so; but there is no testimony that either one of them lifted a hand or said a word in his behalf. And there is nothing to show that in the present case he made any such representations to obtain the contract. The defendant agreed to pay a certain sum upon the accomplishment of an object in which he saw a future benefit to

But where the employment contemplates the bringing to bear of improper, sinister or personal influence, or where its natural and legitimate tendency is in that direction, particularly where compensation is made contingent upon success, it is opposed to public policy and void.<sup>1</sup>

§ 363. **Same Subject—Illustrations.**—Thus in a leading case decided by the Supreme Court of the United States, one Norris had been employed by the Providence Tool Company to endeavor to obtain from the War Department an order for a large number of muskets, and, for his compensation, he was to receive whatever the Government should agree to pay for each musket above a certain sum. Norris thereupon set himself to work, to use his own language, “concentrating influence at the War Department,” and finally succeeded in obtaining a favorable contract. Afterwards a dispute arose between him and the tool company, as to the amount of his commission, and he brought an action to recover it.

The Supreme Court, by Mr. Justice FIELD, said: “The question then is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other ele-

his property. That object was attained, and he has had the benefit he desired. There is no valid reason why he should not fulfil the contract on his part, as Beal promptly fulfilled his part of the agreement.”

<sup>1</sup> But in a case very similar to the one last cited, the party had given his notes in consideration that the owners of the building “would use all proper persuasion to secure the location of the postoffice in their room.” One of the owners was a personal friend of the Postmaster-General and repre-

sented to him that the location was a suitable one and urged upon him the propriety of placing the postoffice in their building, and this was done. The court, however, held that the agreement was against public policy, and that the notes were void. *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746. See also *Filson v. Himes*, 5 Penn. St. 452, 47 Am. Dec. 423; *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69; *Hutchen v. Gibson*, 1 Bush (Ky.) 270.

ment can lawfully enter into the transaction so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other element into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. \* \* \* Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.”<sup>1</sup>

§ 364. **Contract to procure Allowance of Claims.**—Contracts for services to be rendered in the prosecution of claims against governments and municipal bodies stand upon the same footing. As is said by a learned judge in a case involving the right of an attorney to recover upon such a contract: “Professional services, to prepare and advocate just claims for compensation, are as legitimate as services rendered in court in arguing a cause to convince a court or jury that the claim presented, or the defence set up against a claim presented by the other party, ought to be allowed or rejected. Parties in such cases require advocates, and the legal profession must have a right to accept such employment, and to receive compensation for their services; nor can courts of justice adjudge such contracts illegal, if they are free from any taint of fraud, misrepresentation or unfairness.”<sup>2</sup>

But where the contract contemplates that the allowance of the claim is to be sought by using improper means or by bringing personal solicitation, influence or persuasion to bear upon the officer vested with the duty of decision, the undertaking is unlawful and the courts will not enforce it.<sup>3</sup>

<sup>1</sup> Tool Co. v. Norris, 2 Wall. (U. S.) 45; and the same rule was laid down and applied in *Oscanyan v. Arms Co.* 103 U. S. 361.

<sup>2</sup> CLIFFORD, J. in *Stanton v. Embrey*, 93 U. S. 548; *Burbridge v. Fackler*, 2 McArthur (D. C.) 407. The

open and fair presentation of facts and arguments in such cases is unobjectionable. *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362.

<sup>3</sup> *Devlin v. Brady*, 83 Barb. (N. Y.) 518.



§ 365. **Contracts to procure Compromise of Crime or Discontinuance of criminal Proceedings.**—It is a high requirement of the public policy that crimes should be investigated and punished, and the law frowns upon all attempts to suppress investigation or to defeat the administration of justice. Any contract, therefore, for services to be rendered for the purpose of stifling prosecutions, or of obstructing, delaying or preventing the due course of public justice in its efforts to punish crime is opposed to public policy and void.

Thus an agreement with an attorney, for a contingent fee, to settle a criminal case so as to avoid a prosecution;<sup>1</sup> an agreement to pay one for endeavoring to induce the complainant in a prosecution for felony to discontinue the proceedings;<sup>2</sup> an undertaking for compensation to endeavor to prevent the finding of an indictment, and, if found, to endeavor to have the public authorities dismiss it;<sup>3</sup> an agreement for a contingent fee to use one's influence with a prosecuting attorney to induce him to bring about a lighter punishment than otherwise, and to permit the accused to turn State's evidence with the hope of receiving a pardon therefor;<sup>4</sup> and an agreement with an attorney to attempt to induce the sheriff to refrain from arresting A, who is charged with murder, the object being to give A an opportunity to escape,<sup>5</sup> are void.

§ 366. **Contracts for procuring Pardons.**—The same general principles which underlie the questions just discussed, govern here. An agent or attorney may lawfully be employed to attend an open or public hearing of the executive or board of pardons, and make such legitimate arguments and present such petitions, memorials, statements of fact and evidence as are appropriate to bring before the pardoning power all the considerations which may be properly taken into account in behalf of the convicted

<sup>1</sup> Ormerod v. Dearman, 100 Penn. St. 561, 45 Am. Rep. 391.

<sup>2</sup> Rhodes v. Neal, 64 Ga. 704, 37 Am. Rep. 98.

<sup>3</sup> Barron v. Tucker, 53 Vt. 338, 38 Am. Rep. 684.

<sup>4</sup> Wright v. Rindakopf, 48 Wis. 344.

<sup>5</sup> Arrington v. Sneed, 18 Tex. 135; See also Buck v. First National Bank, 27 Mich. 293, 15 Am. Rep. 189; Haines v. Lewis, 54 Iowa 301, 37 Am. Rep. 202; McMahon v. Smith, 47 Conn. 221, 36 Am. Rep. 67; Dodson v. Swan, 2 W. Va. 511, 98 Am. Dec. 787.

person;<sup>1</sup> but all employments having for their object or natural tendency the using of any improper or sinister means, or which contemplate the exercise of personal influence or solicitation, especially if for a contingent fee, are looked upon by the law as demoralizing in their tendency, opposed to public policy and void, even though in the particular case no improper means were used or contemplated.<sup>2</sup>

§ 367. *Same Subject—How when Conviction illegal.*—But where the conviction was unwarranted, as because the court had no jurisdiction, or where there was a grave doubt as to the constitutionality of the statute under which the conviction was had,

<sup>1</sup> *Chadwick v. Knox*, 81 N. H. 226, 64 Am. Dec. 829; *Bremsen v. Engler*, 49 N. Y. Super. Ct. 172; *Formby v. Pryor*, 15 Ga. 258; *Bird v. Breedlove*, 24 Ga. 623. "It is not at once apparent," says BELL, J.; in *Chadwick v. Knox*, *supra*, "that it is not lawful and proper for a party who is suffering the punishment of a crime to apply to the pardoning power for a remission of his sentence; and as far as we are aware, no censure has been regarded as attaching to such an application, either in law or morals. It seems to us equally reasonable for any other person who believes it his duty to make such application in behalf of another, to present the case to the executive, with such petitions, memorials, statements of fact and evidence as are suitable to satisfy the pardoning power of the propriety of the relief desired, and we think no censure can be justly attached to any person for his exertions in such a case if the measures adopted are consistent with the facts of the case, and with the truth and honesty of all parties concerned, while any effort to obtain such pardon by falsehood and misrepresentation, or by any species of fraudulent contrivance, or by prostituting the influence resulting from official sta-

tion, or from personal relation to the pardoning power, is entirely forbidden by law.

A person in prison can do little to aid himself in bringing his case to the consideration of the executive. For everything that must be done without the walls of the prison, the convict is compelled to rely on the assistance of those who have their liberty. Such assistance may be afforded from motives of charity and compassion, or the motive may be in part kindness and in part an expectation that the party relieved will be ready to afford a suitable compensation for the services and expenses; or the party in prison may employ another to do such acts as may be rightfully and properly done for his relief and contract to pay him for his services, and to repay him his expenses. Such a contract, if the parties contemplate only a resort to legal and proper measures, is free from any just exception, and binding upon the parties."

<sup>2</sup> *Hatzfield v. Gulden*, 7 Watts (Penn.) 152, 81 Am. Dec. 750; *Thompson v. Wharton*, 7 Bush (Ky.) 563, 8 Am. Rep. 306; *Haines v. Lewis*, 54 Iowa, 301, 37 Am. Rep. 202; *Kribben v. Haycraft*, 26 Mo. 396; *McGill's Admr. v. Burnett*, 7 J. J. Marsh. (Ky.) 640.

no rule of public policy would be violated by legitimate endeavor to secure the pardon or release of the accused.<sup>1</sup>

§ 368. **Contracts leading to Violation of Duty are void.**—So any contract which has for its object or consideration or which naturally and legitimately tends to induce a public officer to neglect, ignore, violate or exceed his official duty, or to make him less zealous, earnest or diligent in its discharge than the law requires, is contrary to public policy and void.

Thus a contract to pay money or to indemnify in consideration that a sheriff shall levy upon a void writ,<sup>2</sup> or shall seize the goods of a stranger to it,<sup>3</sup> or shall seize exempt property,<sup>4</sup> or shall make a false return,<sup>5</sup> or neglect to serve a writ<sup>6</sup> or permit a prisoner to escape,<sup>7</sup> is void.

§ 369. **Contracts imposing Restraints upon Performance of Duty are void.**—As in the cases noted in the preceding section, any contract by which a public officer imposes restraints or creates obstructions to the future impartial and untrammelled discharge of his duty is void, as where the officer agrees that he will in the future appoint a certain person to an office<sup>8</sup> or that he will annually, for a term of years, renew a liquor license.<sup>9</sup>

#### IV.

##### CONTRACTS RESPECTING THE EMOLUMENTS OF PUBLIC OFFICERS.

§ 370. **Contract that Stranger shall receive all of the Emoluments is void.**—An agreement whereby one person, in consideration of receiving another's assistance in obtaining an office, agrees

<sup>1</sup>Thompson v. Wharton, *supra*;  
Timothy v. Wright, 8 Gray (Mass.)  
522.

<sup>2</sup>Collier v. Windham, 27 Ala. 291,  
62 Am. Dec. 767.

<sup>3</sup>Prewitt v. Garrett, 6 Ala. 128, 41  
Am. Dec. 40; Morgan v. Hale, 12 W.  
Va. 718.

<sup>4</sup>Hunter v. Agee, 5 Humph. (Tenn.)  
57.

<sup>5</sup>Knipe v. Hobart, 1 Lutw. 596.

<sup>6</sup>Hodsdon v. Wilkins, 7 Me. 113, 20  
Am. Dec. 347.

<sup>7</sup>Love v. Palmer, 7 Johns. (N. Y.)  
159; Webber v. Blunt, 19 Wend. (N.  
Y.) 188, 32 Am. Dec. 445; Ayer v.  
Hutchins, 4 Mass. 370, 3 Am. Dec.  
282.

<sup>8</sup>Hager v. Catlin, 18 Hun (N. Y.)  
448.

<sup>9</sup>City of Jackson v. Bowman, 39  
Miss. 671.

that the latter may receive all the fees and emoluments of the office, is void, and no action can be maintained upon it.<sup>1</sup>

§ 371. **Contract that Stranger shall receive Part of the Emoluments is void.**—So a contract whereby one person in consideration of the assistance of another, either in influence,<sup>2</sup> or money,<sup>3</sup> agrees to divide the emoluments with the latter is likewise void, “Contracts,” it is said in one case,<sup>4</sup> “by which parties agree to bestow their money and services to secure the election of candidates for public office, and the candidates in consideration thereof agree, if elected, to share with such parties the profits and income of their offices, corrupt and poison the very source of political power in republican governments.”

§ 372. **Contract to surrender all or part of Emoluments to Public is void.**—So a contract by which the officer agrees, in consideration of his appointment or election, to surrender to the public the fees or salary of the office in whole or in part,<sup>5</sup> or to receive something else in compensation than that which the law provides,<sup>6</sup> is void.

Where, however, the officer had expressly released all claims for salary in consideration of a given sum, the court refused to permit him to impeach his release by showing that it was filed prior to the election for the purpose of inducing electors to vote for him. The parties were held to be in *pari delicto*, and the court left them where it found them.<sup>7</sup>

§ 373. **Election procured by such Contract is void.**—Such a contract also amounts, in legal effect, to bribery in its largest sense, and invalidates the officer's election, if procured thereby, and he may be removed upon *quo warranto*.<sup>8</sup>

<sup>1</sup> Garforth v. Fearon, 1 H. Bl. 327.

<sup>2</sup> Gray v. Hook, 4 N. Y. 449; Hunter v. Nolf, 71 Penn. St. 282.

<sup>3</sup> Martin v. Wade, 87 Cal. 168.

<sup>4</sup> Rhodes, J., in Martin v. Wade, *supra*.

<sup>5</sup> See Carrothers v. Russell, 58 Iowa 846, 36 Am. Rep. 232; State v. Collier, 73 Mo. 18, 37 Am. Rep. 417; State v. Purdy, 36 Wis. 218, 17 Am. Rep. 485; State v. Church, 5 Oreg. 875, 20 Am. Rep. 746.

<sup>6</sup> Liverpool v. Wright, 28 L. J. ch. 868.

<sup>7</sup> Harvey v. Tama County, 58 Iowa 238.

<sup>8</sup> State v. Collier, 73 Mo. 18, 37 Am. Rep. 417; Carrothers v. Russell, 58 Iowa 846, 36 Am. Rep. 232; State v. Purdy, 36 Wis. 218, 17 Am. Rep. 485. See also Tucker v. Aiken, 7 N. H. 118; Alvord v. Collin, 20 Pick. (Mass.) 428.

In People v. Thornton, 25 Hun (N.

§ 374. **Contracts to pay additional Compensation for Performance of Duty are void.**—It is the presumption of the law that the salary, fees or other compensation which it has fixed as the reward for the performance of official duty are adequate, and the officer, by accepting the office, impliedly agrees to perform its duties for the reward so prescribed. To permit him to exact more as a condition to the performance of his duty would be to countenance and encourage official exaction and oppression. To enforce a voluntary promise to pay him more, would be to countenance and encourage bribery and corruption in respect to public officials.

All contracts, therefore, whether made by the public<sup>1</sup> or by individuals,<sup>2</sup> and whether voluntary or exacted, to pay a public officer for the performance of an act which the law makes it his duty to perform without pay,<sup>3</sup> or to pay him a compensation in addition to that which the law has fixed, are opposed to public policy and void.

So a contract to pay extra compensation for incidental or collateral services properly belonging to or forming a part of his office is void,<sup>4</sup> as is also an express allowance of a claim for such services against the public.<sup>5</sup>

§ 375. **Contract to pay for Services in independent Employment is valid.**—But a contract to pay a public officer for lawful

Y.) 456, it is held that while such contracts are opposed to public policy, they do not *per se*, in the absence of a constitutional or statutory provision to that effect, invalidate the election.

<sup>1</sup> See *post* § 861. *Bayha v. Webster County*, 18 Neb. 181; *People v. Devlin*, 83 N. Y. 269, 83 Am. Dec. 377; *Haynes v. State*, 8 Humph. (Tenn.) 480, 89 Am. Dec. 187; *Turpen v. Commissioners*, 7 Ind. 172; *Miami v. Blake*, 21 Ind. 82; *United States v. Smith*, 1 Bond C. C. 68; *Lancaster County v. Fulton*, — Penn. —, 18 Atl. Rep. 384; *Huffman v. Commissioners*, 25 Kans. 64.

<sup>2</sup> See *post*, § 882. *Wilcoxson v. An-*

*draws*, 66 Mich. 553; *Peck v. Bank*, 51 Mich. 353; *Burk v. Webb*, 83 Mich. 174; *Vandercook v. Williams*, 106 Ind. 345; *Fort Wayne v. Lehr*, 88 Ind. 62; *Willemin v. Bateson*, 63 Mich. 309; *Hatch v. Mann*, 15 Wend. (N. Y.) 44; *Trundle v. Riley*, 17 B. Mon. (Ky.) 396.

<sup>3</sup> *Preston v. Bacon*, 4 Conn. 471; *Neustadt v. Hall*, 58 Ill. 172.

<sup>4</sup> *Decatur v. Vermillion*, 77 Ill. 315; *Rowe v. Kern County*, 73 Cal. 353; *Sidway v. Park Commissioners*, 120 Ill. 496.

<sup>5</sup> *Adams County v. Hunter*, — Iowa —, 43 N. W. Rep. 280; *Griffin v. Clay County*, 68 Iowa 413.

services rendered by him in an independent employment, not forming a part of his official duty, is valid.<sup>1</sup>

§ 376. **Contract to pay Reward for Performance of official Duty not valid.**—For reasons similar to those which condemn contracts to pay an officer increased compensation for the performance of his legal duty, it is held that he can not recover from the public<sup>2</sup> or from an individual<sup>3</sup> a reward offered by either for the performance of that which it was his legal duty to perform without reward.

But where the act is one which is not within the scope of his duty and which his office does not require him to perform, a contract to pay a reward for its performance is not invalid.<sup>4</sup>

§ 377. **Contract to accept Less than legal Compensation is not binding.**—So it is held that a contract to accept less than the compensation prescribed by law is opposed to public policy and void. “If by contract” says the Supreme Court of Iowa,<sup>5</sup> “he may take less, why may not the parties contract for an enlarged compensation? We think a contract whereby an officer agrees to accept a less or greater compensation than is prescribed by statute, \* \* \* is contrary to public policy and void.”<sup>6</sup>

§ 378. **Contract to waive legal Means for collecting Compensation is void.**—So a contract whereby the officer agrees not to avail himself of a statutory mode of enforcing the collection of his compensation is opposed to public policy and void.<sup>7</sup>

<sup>1</sup> See *post*, § 862, *Evans v. Trenton*, 24 N. J. L. 764; *Niles v. Muzzy*, 38 Mich. 61, 20 Am. Rep. 670; *McBride v. Grand Rapids*, 47 Mich. 236, s. c. 49 Mich. 239; *United States v. Brindle*, 110 U. S. 688.

<sup>2</sup> *Pool v. Boston*, 5 Cush. (Mass.) 319.

<sup>3</sup> *Kick v. Merry*, 28 Mo. 72, 66 Am. Dec. 658; *Stamper v. Temple*, 6 Humph. (Tenn.) 118, 44 Am. Dec. 396; *Smith v. Whildin*, 10 Penn. St. 39, 49 Am. Dec. 572; *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1; *Gillmore v. Lewis*, 12 Ohio 281; *Day v. Putnam Ins. Co.* 16 Minn. 408; *Warner v. Grace*, 14 Minn. 487;

*Marking v. Needy*, 8 Bush (Ky.) 22; *Brown v. Godfrey*, 38 Vt. 120.

<sup>4</sup> See *post*, § 885; *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 815; *Hayden v. Souger*, 56 Ind. 45, 26 Am. Rep. 1; *Morrell v. Quarles*, 35 Ala. 544.

<sup>5</sup> *Hawkeye Ins. Co. Brainard*, 72 Iowa 180, 182.

<sup>6</sup> *Citing Gilman v. Des Moines V. Ry. Co.* 40 Iowa 200; *McConkey v. Chapman*, 58 Iowa 281; *Boardman v. Thompson*, 25 Iowa 487; *Adye v. Hanna*, 47 Iowa 264, and distinguishing the case at bar from *Willemín v. Bateson*, 63 Mich. 309, 29 N. W. Rep. 734.

<sup>7</sup> *Hawkeye Ins. Co. v. Brainard*, 72

## V.

## CONTRACTS RESPECTING DIVISION OF FEES WITH DEPUTIES.

§ 379. Where all Fees belong to Principal he may contract for Portion of those earned by Deputy.—Where the duties of an office are such as may be performed by a deputy, and the fees attached to the office belong primarily to the principal, he may agree with his deputy to allow him a fixed compensation for his services, or that the deputy shall permit the principal to retain a certain proportion of the profits of the office.<sup>1</sup> So if a deputy be appointed to an office having uncertain profits, an agreement with the deputy that the latter shall allow the principal a fixed sum *out of such profits* is good, because the deputy is to pay out of the profits only, and cannot be charged for more than he receives.<sup>2</sup>

§ 380. But Contract to pay Principal fixed Sum at all Events is void.—But an agreement of a deputy to allow to his principal a sum in gross, not payable out of the profits of the office, and which may, therefore, exceed such profits, is a sale of the office and void.<sup>3</sup> So it is, also, where an office consisting of uncertain fees is granted to a deputy, together with all the fees, reserving to the principal a certain sum to be paid at all events.<sup>4</sup>

§ 381. Where Fees legally belong to Deputy, Contract to

Iowa 180, 182. In this case a justice of the peace agreed that in all suits brought before him by the insurance company, he would demand and collect no fees unless the company collected them of the defendant. The question whether, notwithstanding the agreement, he could recover his legal fees was held not to be before the court. See on this point, *Willemin v. Bateson*, 63 Mich. 309; *Wilcoxson v. Andrews*, 66 Mich. 553, where the question is answered in the negative.

<sup>1</sup> *Becker v. Ten Eyck*, 6 Paige (N. Y.) 68; *Mott v. Robbins*, 1 Hill (N. Y.) 21, 37 Am. Dec. 286; *Welch v.*

*Baden*, 8 Keb. 717; *Gulliford v. De-Cardonell*, 2 Salk. 466; *Ballantine v. Irwin*, Fort. 868; *Machen v. Stanyon*, 1 Bro. P. C. 183.

<sup>2</sup> *Becker v. Ten Eyck*, *supra*; *Mott v. Robbins*, *supra*.

<sup>3</sup> *Becker v. Ten Eyck*, 6 Paige (N. Y.) 68; *Godolphin v. Tudor*, 2 Salk. 478; *Mott v. Robbins*, 1 Hill (N. Y.) 21, 37 Am. Dec. 286.

<sup>4</sup> *Becker v. Ten Eyck*, 3 Paige (N. Y.) 68; *Mott v. Robbins*, 1 Hill (N. Y.) 21, 37 Am. Dec. 286; *Garforth v. Fearon*, 1 H. Bl. 327; *Salling v. McKinney*, 1 Leigh (Va.) 42, 19 Am. Dec. 722.

**divide** these is void.—So where the fees do not all belong to the principal primarily, but a portion of them are attached by law to the office of the deputy as such, an agreement by the deputy to divide these with the principal, if appointed, amounts to a purchase of the office and is therefore void.<sup>1</sup>

<sup>1</sup> Tappan v. Brown, 9 Wend. (N. Y.) 175. Here the deputy, on being appointed, agreed to receive a fixed salary instead of the fees to which he was by law entitled. The agreement

was held void, and the officer could therefore not recover the salary, nor could he recover the fees, because by entering into this agreement he had, under the statute, forfeited his office.



## BOOK II.

### OF THE TERMINATION OF THE OFFICER'S AUTHORITY.

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#### CHAPTER I.

##### IN GENERAL.

§ 382. Purpose of Book II.

383. Variety of Methods.

§ 382. **Purpose of Book II.**—Having in the preceding Book considered the nature of a public office and how a person may be chosen and qualified for it, it now remains to be seen how the authority and duties imposed by the office may be terminated.

§ 383. **Variety of Methods.**—It will be evident that this may be accomplished in a variety of ways. The most natural of these is by the expiration of the term for which he was chosen, but the officer may also resign or abandon his office or be removed from it by competent authority. The office itself may also be abolished. Each of these methods will be the subject of a separate chapter.

## CHAPTER II.

### BY THE EXPIRATION OF HIS TERM.

#### § 384. In general.

385. What is meant by Term.

386. When Term begins.

387. Legislature can not change Term fixed by the Constitution.

388. In other cases Legislature may prescribe.

389. Legislature may change Term.

390. Construction of Laws fixing Term.

391. Subsequent Terms presumed to be of same Length as first.

392. Presumption from Order of Appointment.

393. Presumption from Times for Appointment.

394. Incumbent estopped by his own Interpretation.

395. Governor can not enlarge Term by the Commission.

#### I. WHERE DURATION OF TERM IS FIXED.

396. Expiration of Term dissolves Officer's Authority.

397. How when authorized to hold over.

398. Officer who has held for full

Constitutional Period can not hold over.

§ 399. When officer holds over notwithstanding Resignation.

400. Provision for holding over do not apply to Office declared forfeited.

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404. Right to hold over applies to Officers elected by Legislature.

#### II. WHERE DURATION OF TERM IS UNCERTAIN.

405. Office created for Performance of a single Act terminates upon its Performance.

406. Officer holding during Pleasure of appointing Power removable at Will.

407. Office vacated by Abolishment of appointing Power.

408. Office vacated by Repeal of Law creating it.

§ 384. In general.—The most natural and frequent method by which a public officer ceases to be such is by the expiration of the term for which he was elected or appointed. The question of when this event has occurred depends upon a number of considerations, the most prominent of which, perhaps, are whether he was originally elected or appointed.—1. For a definite term, or 2. For a term dependent upon some act or event, as during the pleasure of the appointing power.

Each of these subdivisions will be separately treated. But certain preliminary questions may well be noticed first. Thus—

§ 385. **What is meant by "Term."**—The word *term*, when used in reference to the tenure of office, means ordinarily a fixed and definite time, and does not apply to appointive offices held at the pleasure of the appointing power.<sup>1</sup>

§ 386. **When Term begins.**—Statutes creating public offices usually prescribe the limits of the terms provided for, fixing the dates at which they shall begin and end. The date for the commencement of the term is ordinarily fixed for some appreciable period after the election or appointment, in order to give the newly chosen officer time to arrange his affairs and to qualify in the prescribed manner.

Where, however, no time is fixed, the term will begin on the date of the election,<sup>2</sup> in the case of elective officers, and at the date of the appointment where the officer is appointed.<sup>3</sup>

Where the term runs "from" a certain date, the day of the date is excluded in the computation.<sup>4</sup>

§ 387. **Legislature can not change Term fixed by the Constitution.**—Where the term of the officer is fixed by the constitution, the legislature can neither extend nor abridge it.<sup>5</sup>

So where the constitution directs that a certain officer shall be elected by the people, and authorizes the legislature to fix the

<sup>1</sup> *Speed v. Crawford*, 8 Metc. (Ky.) 207.

<sup>2</sup> *State v. Constable*, 7 Ohio 7; *Marshall v. Harwood*, 5 Md. 428; *Hughes v. Buckingham*, 5 S. & M. (Miss.) 682. Where statute provides for office, but fixes no date for its commencement, though requiring a commission to be issued, the commission will be held to have issued within a reasonable time, and the office will date from then. *Brodie v. Campbell*, 17 Cal. 11.

<sup>3</sup> *Attorney-General v. Love*, 10 Vroom (N. J.) 476, 28 Am. Rep. 284. Where no time is fixed, party may enter as soon as he has received his

certificate and has qualified. *McGee v. Gill*, 79 Ky. 106; *Haight v. Love*, 89 N. J. L. 14, s. c. 89 N. J. L. 476, 28 Am. Rep. 284. The commission does not fix the term, and is simply evidence of the right to the office. *State v. Chapin*, 110 Ind. 272, 11 N. East. Rep. 317.

<sup>4</sup> *Best v. Polk*, 18 Wall. (U. S.) 112.

<sup>5</sup> *State v. Brewster*, 44 Ohio St. 539, 9 N. East. Rep. 849; *Goodin v. Thoman*, 10 Kans. 191; *Grieble v. State*, 111 Ind. 869, 12 N. East. Rep. 700; *Pursel v. State*, 111 Ind. 519, 13 N. East. Rep. 1003; *Douglass v. State*, 31 Ind. 439; *Howard v. State*, 10 Ind. 99.

term and prescribe the time and place of the election, and the length of the term has been fixed and the officer elected, an act of the legislature extending the term of the present incumbent is unconstitutional and void.<sup>1</sup>

So where the constitution provides that an officer shall hold at the pleasure of the appointing power, a statute prescribing that he shall hold for a fixed term is invalid.<sup>2</sup>

But a constitutional provision that the term of no officer should be extended to a longer period than that for which such officer was elected or appointed, was held not to be intended to, and did not prevent the legislature from making reasonable changes in the times for electing public officers, and the fact that a statute for that purpose had the effect incidentally to extend the time of the present incumbent, did not render it unconstitutional.<sup>3</sup>

§ 388. **In other Cases Legislature may prescribe.**—But where no such constitutional limitation intervenes, the fixing or altering of the term of public officers is entirely within the control of the legislature,<sup>4</sup> or of the inferior municipal bodies to which it has delegated the power.<sup>5</sup>

§ 389. **Legislature may change the Term.**—So, in the absence of such constitutional prohibitions, the legislature may change the length of the term, even after the election or appointment,<sup>6</sup> though it is held that such a change will not be deemed to affect the term of the present incumbents in the absence of a clearly expressed intention so to do.<sup>7</sup>

§ 390. **Construction of Laws fixing Term.**—Where a consti-

<sup>1</sup> *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 802, disapproving of *People v. Oulton*, 28 Cal. 44, and distinguishing *People v. Batchelor*, 29 N. Y. 128.

<sup>2</sup> *People v. Perry*, — Cal. —, 21 Pac. Rep. 423.

<sup>3</sup> *State v. McGovney*, 92 Mo. 428, 8 West. Rep. 720, following *State v. Ranson*, 73 Mo. 89.

<sup>4</sup> *State v. Bailey*, 33 N. W. Rep. 778, s. c. *sub nom.* *Matter of Jordan*, 37 Minn. 174; *State v. Howe*, 25 Ohio St. 568, 18 Am. Rep. 321.

Legislature may shorten term not

fixed by the constitution. *Taft v. Adams*, 3 Gray (Mass.) 126.

<sup>5</sup> *Chandler v. Lawrence*, 128 Mass. 218.

<sup>6</sup> *Matter of Jordan*, 37 Minn. 174, s. c. *sub nom.* *State v. Bailey*, 33 N. W. Rep. 778; *In re Bulger*, 45 Cal. 558; *Wilcox v. Rodman*, 46 Mo. 322.

But note *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 802, in § 387, *ante*.

<sup>7</sup> *Farrell v. Pingree*, — Utah —, 16 Pac. Rep. 843.

tutional provision prescribing the term of a public office is uncertain or doubtful in its construction, that interpretation will be adopted which limits the term to the shortest time.<sup>1</sup>

§ 391. **Subsequent Terms presumed to be of same Length as first.**—Where a statute provided that an officer shall be elected to hold for a certain time, as for two years and until his successor is elected and qualified, but does not prescribe the length of subsequent terms, it will be presumed that they were to be of the same length as the first and that biennial elections were intended.<sup>2</sup>

§ 392. **Presumption from Order of Appointment.**—Where an appointment was made of two persons to fill two vacancies in the same body but of unequal lengths, without designating which was to fill the vacancy of the first class and which of the second, it was presumed that it was the intention that the person first named should fill the vacancy of the first class and the person last named the other.<sup>3</sup>

§ 393. **Presumption from Times for Appointment.**—So where the statute provided that a certain officer should be appointed *annually*, and an appointment was made without designating the length of the term, it was presumed to be for one year.<sup>4</sup>

§ 394. **Incumbent estopped by own Interpretation.**—An incumbent of an office who placed a certain construction upon the provisions fixing the term of his office, by entering upon it on a given day as the day when it commences, and who has subsequently held for the full period fixed by law, is estopped to deny to his successor the same interpretation and must vacate the office when the term expires as he has himself fixed it.<sup>5</sup>

§ 395. **Governor can not enlarge Term by the Commission.**—Where the term for which an officer is to hold is fixed by law, the governor can not enlarge it or confer extended powers, by issuing a commission in which a greater term is named.<sup>6</sup>

<sup>1</sup> Wright v. Adams, 45 Tex. 184.

<sup>2</sup> State v. Percy, 44 Mo. 159.

<sup>3</sup> People v. Richmond County, 20 N. Y. 252.

<sup>4</sup> Buffalo v. Mackay, 15 Hun (N. Y.)

<sup>5</sup> Pursel v. State, 111 Ind. 519, 12 N. East. Rep. 1008; Griebble v. State,

111 Ind. 369, 12 N. East. Rep. 700.

<sup>6</sup> Hench v. State, 72 Ind. 297.

## I.

## WHERE DURATION OF TERM IS FIXED.

§ 396. **Expiration of Term dissolves Officer's Authority.**—Upon the expiration of the officer's term, unless he is authorized by law to hold over, his rights, duties and authority as a public officer must *ipso facto* cease.<sup>1</sup>

§ 397. **How when authorized to hold over.**—It is usually provided by law that officers elected or appointed for a fixed term shall hold not only for that term but until their successors are elected and qualified. Where this provision is found, the office does not become vacant upon the expiration of the term if there is then no successor elected and qualified to assume it, but the present incumbent will hold until his successor is elected and qualified, even though it be beyond the term fixed by law.<sup>2</sup>

Where, however, no such provision is made, the right to hold over is not clear. The prevailing opinion in this country seems to be that, unless expressly or impliedly forbidden, the incumbent of a municipal office may continue to hold it until someone else is chosen and qualified to assume the office.<sup>3</sup> The same opinion obtains also as to officers generally, other than judges, members of the legislature, and the executive at least,<sup>4</sup> though there are decisions to the contrary.<sup>5</sup>

<sup>1</sup> *Badger v. United States*, 93 U. S. 599; *People v. Tieman*, 8 Abb. Pr. (N. Y.) 359, 30 Barb. 193.

<sup>2</sup> *Walker v. Ferrill*, 58 Ga. 512; *Jones v. Jefferson*, 66 Tex. 576; *State v. Harrison*, 118 Ind. 484; *Tuley v. State*, 1 Ind. 500; *Miller v. Burger*, 2 Ind. 337; *Baker v. Kirk*, 33 Ind. 517; *State v. Berg*, 50 Ind. 496; *Gosman v. State*, 106 Ind. 208; *Elam v. State*, 75 Ind. 518; *Weir v. Bush*, 4 Litt. (Ky.) 433; *In re Lawhorne*, 18 Gratt. (Va.) 85; *State v. Howe*, 25 Ohio St. 588.

<sup>3</sup> *Dillon's Munic. Corp.* (3d ed.) § 219, citing *People v. Runkle*, 9 Johns. (N. Y.) 147; *Slee v. Bloom*, 5 Johns. (N. Y.) Ch. 366, 378; 2 Kent. Com. 238; *Kelsey v. Wright*, 1 Root (Conn.) 83; *Smith v. Natchez Steamboat Co.*, 1

*How.* (Miss.) 479; *Lynch v. Lafland*, 4 Cold. (Tenn.) 96; *South Bay, &c., Co. v. Gray*, 30 Me. 547; *Elmendorf v. Mayor*, 25 Wend. (N. Y.) 693.

See also *State v. Harrison*, 118 Ind. 484, adopting same view, and citing *Tuley v. State*, 1 Ind. 500; *People v. Runkle*, 9 Johns. 147; *Trustees v. Hills*, 6 Cow. 23; *McCall v. Byram Mfg. Co.*, 6 Conn. 428; *State v. Fagan*, 42 Conn. 32; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Stratton v. Oulton*, 28 Cal. 44; *People v. Bull*, 46 N. Y. 57.

<sup>4</sup> See *Christian v. Gibbs*, 53 Miss. 314; *Stratton v. Oulton*, *supra*; *People v. Bull*, *supra*.

<sup>5</sup> See *Badger v. United States*, *supra*; *People v. Tieman*, *supra*; *Phillips v. Wickham*, 1 Paige, 594.

Such a rule seems to be demanded by the most obvious requirements of public policy, for without it there must frequently be cases where, from a failure to elect or a refusal or neglect to qualify, the office would be vacant and the public service entirely suspended.

§ 398. **Officer who has held for full constitutional Period can not hold over.**—But notwithstanding a general provision that the incumbent of an office shall hold over until the election and qualification of his successor, yet where the incumbent has, at the expiration of his term, held for the full period permitted by the constitution, as where that instrument forbids the same person from holding the same office for more than a given number of years, he can not hold over, but the office will become vacant where his successor dies before qualifying.<sup>1</sup>

§ 399. **When Officer holds over notwithstanding Resignation.**—Under such a provision that the present incumbent shall hold over until his successor is elected and qualified, it is held that, so far as this is necessary for the protection of the public, the officer will be deemed to continue in office until his successor is elected and qualified, notwithstanding the previous acceptance of his resignation.<sup>2</sup>

“The resignations,” says Mr. Justice HUNT, “may be made to and accepted by the officers named; but to become perfect, they depend upon and must be followed by an additional fact, to wit, the appointment of a successor, and his qualification. When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor.”

The contrary rule, however, prevails in New York.<sup>4</sup>

§ 400. **Provisions for holding over do not apply to Office declared forfeited.**—But the provisions authorizing the incumbent to hold over to await the election and qualification of his

<sup>1</sup> Gosman v. State, 106 Ind. 203.

<sup>2</sup> In Badger v. United States, 93 U.

<sup>3</sup> Jones v. Jefferson, 68 Tex. 576; S. 599, 603.

Badger v. United States, 93 U. S.

<sup>4</sup> Olmsted v. Dennis, 77 N. Y. 378.

599, affirming 6 Bissell (U. S. C. C.)

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successor do not apply to one who has been adjudged, by a competent tribunal, to have forfeited his office, but from the date of the judgment the office became *ipso facto* vacant.<sup>1</sup>

§ 401. Right to hold over does not revive on Death of Successor.—But when a successor has been legally elected and qualified, the prior incumbent's right to hold over thereupon ceases, and it does not revive because his successor dies after his qualification, but before the commencement of his term.<sup>2</sup>

Where, however, the successor dies before he has fully qualified, the prior incumbent holds over.<sup>3</sup>

§ 402. Officers filling Vacancies in elective Offices hold only till next Election.—Officers elected or appointed to fill vacancies in an elective office are in simply for the remainder of the unexpired term, and hold therefore only until the next regular election.<sup>4</sup> In case of a failure then to elect, however, they would ordinarily hold over.<sup>5</sup>

Where such an officer is to fill the vacancy, by express terms of law "until a successor is elected and qualified," he can be superseded only by one who is duly *elected*, and his holding is not terminated by the *appointment* of a successor.<sup>6</sup>

§ 403. What is meant by "next regular Election."—Whether the words "next regular" or "next general" election mean the next election at which officers generally can be elected, or only an election at which, by law, the particular officer in question is to be voted for, is a question upon which the authorities are in conflict. The former view prevails in Kansas,<sup>7</sup> and the latter in North Carolina.<sup>8</sup>

§ 404. Right to hold over applies to Officers elected by Legislature.—The right to hold over under a provision of law

<sup>1</sup> Hyde v. State, 52 Miss. 665.

<sup>2</sup> State v. Seay, 64 Mo. 89, 27 Am. Rep. 206; State v. Hopkins, 10 Ohio St. 509.

<sup>3</sup> Commonwealth v. Hanley, 9 Penn. St. 517.

<sup>4</sup> Opinion of Judges, 64 Me. 596; State v. Seay, 64 Mo. 89, 27 Am. Rep. 206; State v. Foster, 36 Kans. 504, 18 Pac. Rep. 841; Parcel v.

State, 110 Ind. 122, 11 N. East. Rep. 4; People v. Wilson, 72 N. C. 155; State v. Johns, 8 Oreg. 538.

<sup>5</sup> But see Hagerty v. Arnold, 18 Kans. 367.

<sup>6</sup> People v. Lord, 9 Mich. 237.

<sup>7</sup> State v. Foster, 36 Kans. 504, 18 Pac. Rep. 841. See also State v. Johns, 8 Oreg. 538.

<sup>8</sup> People v. Wilson, 72 N. C. 155.



conferring that right upon "any officer," applies as well to those officers who are elected by the legislature as to those elected by the people or appointed by the executive.<sup>1</sup>

## II.

### WHERE DURATION OF TERM IS UNCERTAIN.

§ 405. **Office created for Performance of a single Act terminates upon its Performance.**—Where an office is created, or an officer is appointed, for the purpose of performing a single act or the accomplishment of a given result, the office terminates and the officer's authority ceases with the accomplishment of the purpose which called it into being.<sup>2</sup>

§ 406. **Officer holding during Pleasure of appointing Power removable at Will.**—So where the officer is appointed to hold during the pleasure of the appointing power, his holding is terminable at the will of the latter.<sup>3</sup> This subject belongs more properly to the chapter on Removals from Office, to which the reader is referred.<sup>4</sup>

§ 407. **Office vacated by Abolishment of appointing Power.**—Offices created and filled by an authority which is itself dependent upon and subservient to a higher power, as in the case of municipal officers and officers appointed by local boards, are vacated by the termination of the power which created them, as by the repeal of a municipal charter<sup>5</sup> or the abolishment of a local board.<sup>6</sup>

§ 408. **Office vacated by Repeal of Law creating it.**—So an office will be vacated if the law or ordinance by which it was created be repealed without reservation.<sup>7</sup>

<sup>1</sup> *State v. Harrison*, 118 Ind. 434, 8 Am. St. Rep. 663, 16 N. East Rep. 334.

<sup>2</sup> *Bergen v. Powell*, 94 N. Y. 591. See also *Mechem on Agency*, § 201; *Douville v. Supervisors*, 40 Mich. 535.

<sup>3</sup> *Patton v. Vaughan*, 39 Ark. 211; *State v. Commissioners*, 88 Mo. 144; *People v. Shear*, — Cal. —, 15 Pac. Rep. 93; *People v. Whitlock*, 92 N.

Y. 192; *State v. Doherty*, 25 La. Ann. 119, 18 Am. Rep. 181; *People v. Hill*, 7 Cal. 97; *Keenan v. Perry*, 24 Tex. 253.

<sup>4</sup> See *post* §§ 444-462.

<sup>5</sup> *Dillon Mun. Corp.* § 64.

<sup>6</sup> *State v. Board*, 7 Neb. 42. See *Mechem on Agency*, § 370.

<sup>7</sup> *Chandler v. Lawrence*, 128 Mass. 213.

## CHAPTER III.

## BY RESIGNATION OF THE OFFICE.

§ 409. In general—Officers may resign.

410. Cannot resign until elected and qualified.

411. What constitutes a Resignation.

412. In what Form made.

413. To whom Resignation is to be made.

§ 414. Resignation not complete until it is accepted.

415. What amounts to an Acceptance.

416. When Officer holds until Successor is chosen, notwithstanding Acceptance of his Resignation.

417. Withdrawal of Resignation.

418. Resignation while insane.

§ 409. In general—Officer may resign.—It may be said in a general way that a public officer has the right to resign his office at any time, and some authorities have declared this right in unqualified terms.<sup>1</sup> The weight of authority, however, and the obvious dictates of public policy require that the right shall be declared in a much more restricted manner.

Thus it is said by Mr. Justice BRADLEY of the Supreme Court of the United States:<sup>2</sup> "As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and be subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the

<sup>1</sup> People v. Porter, 6 Cal. 26; State v. Clarke, 3 Nev. 519; Olmsted v. Dennis, 77 N. Y. 378; Gates v. Delaware County, 12 Iowa 405.

<sup>2</sup> In Edwards v. United States, 108 U. S. 471.

community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws."<sup>1</sup>

So it is said by Chief Justice RUFFIN of North Carolina,<sup>2</sup> "It is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted; and that has been so much a matter of course with respect to lucrative offices, as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. Hence there are on our statute book several acts to compel men to serve in offices. Every man is obliged, upon a general principle, after entering upon his office, to discharge the duties of it while he continues in office, and he can not lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged."

§ 410. Can not resign until elected and qualified.—Upon the principle that one can not resign what he does not yet possess, it is held that one who has not been elected to a public office can not resign the same,<sup>3</sup> or if elected, can not resign until the time has arrived when he is entitled by law to possess the same and he has taken the oath and given the required bond and entered upon the discharge of his duties.<sup>4</sup>

§ 411. What constitutes a Resignation.—"To constitute a complete and operative resignation," it is said in one case,<sup>5</sup>

<sup>1</sup> Citing 1 Kyd, Corporations, c. 8, sect. 4; Willcock, Corporations, pp. 129, 238, 239; Grant, Corporations, pp. 221, 223, 268; 1 Dillon, Mun. Corp. sect. 163; Rex v. Bower, 1 Barn. & Cres. 585; Rex v. Burder, 4 T. R. 778; Rex v. Lone, 2 Stra. 920; Rex v. Jones, 2 Stra. 1146; Hoke v. Henderson, 4 Dev. (N. C.) L. 1, 25

Am. Dec. 677; Van Orsdall v. Hazard, 8 Hill (N. Y.) 243; State v. Ferguson, 31 N. J. L. 107.

<sup>2</sup> In Hoke v. Henderson, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677.

<sup>3</sup> Queen v. Blizard, L. R. 2 Q. B. 55.

<sup>4</sup> Miller v. Supervisors, 25 Cal. 93.

<sup>5</sup> Biddle v. Willard, 10 Ind. 63.

"there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment. Webster and Richardson define the words *resign* and *resignation* substantially thus: to resign is to give back, to give up, in a formal manner, an office; and resignation is the act of giving it up. BOUVIER says, "resignation is the act of an officer by which he declines his office, and renounces the further right to use it."

When, therefore, an unconditional resignation is transmitted to the proper officer with the intention that it shall operate as such, it amounts, so far as the officer making it is concerned, to a resignation.<sup>1</sup>

§ 412. **In what Form made.**—Where by law a resignation is required to be made in any particular form, that form must be substantially complied with; but where no such form is prescribed, no particular mode is required, but the resignation may be made by any method indicative of the purpose.<sup>2</sup> It need not be in writing, unless so required by law.<sup>3</sup>

§ 413. **To whom Resignation is to be made.**—Statutes usually prescribe to whom the resignation of a public officer is to be made, but in the absence of such a provision it is properly made to that officer or body which is by law authorized to act upon it by appointing a successor, or calling an election to fill the vacancy.<sup>4</sup>

§ 414. **Resignation not complete until it is accepted.**—At common law, the resignation of a public officer was not complete, so far as the public is concerned, until it was duly accepted by the proper authorities.<sup>5</sup> And this rule prevails in

<sup>1</sup> State v. Clarke, 3 Nev. 519; State v. Fitts, 49 Ala. 402.

<sup>2</sup> 1 Dillon Munic. Corp. § 224.

<sup>3</sup> Barbour v. United States, 17 Ct. Cl. 1499; Van Orsdall v. Hazard, 3 Hill (N. Y.) 243.

<sup>4</sup> Edwards v. United States, 103 U. S. 471.

<sup>5</sup> Edwards v. United States, 103 U. S. 471, citing 1 Kyd Corp. c. 3, sec.

4; Willcock, Corp. pp. 129, 238, 289; Grant, Corp. pp. 221, 223, 268; 1 Dillon Munic. Corp. § 163; Rex v. Bower, 1 B. & C. 585; Rex v. Burder, 4 T. R. 778; Rex v. Lone, 3 Stra. 920; Rex v. Jones, 2 Stra. 1146; Hoke v. Henderson, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677; Van Orsdall v. Hazard, 3 Hill (N. Y.) 243; State v. Ferguson, 81 N. J. L. 107.

many of the United States,<sup>1</sup> though not in all,<sup>2</sup> and, except where there is a statutory provision to the contrary, is supported by the weight of both reason and authority. "An officer may certainly resign," says Chief Justice RUFFIN, "but without acceptance his resignation is nothing, and he remains in office." He is, therefore, so far as the rights of third persons are concerned, not only still clothed with the authority, but is subject to the burdens of the office, and he may be compelled to perform the duties,<sup>3</sup> and is liable for their non-performance,<sup>4</sup> as before.

So where, because of the office he seeks to resign, he is ineligible to another office, he continues so until his resignation is accepted.<sup>5</sup>

The reasons upon which this rule is founded have been stated in the opening section of this chapter, and need not be repeated here.

§ 415. **What amounts to an Acceptance.**—The acceptance of the resignation, where this is required, may be manifested either by a formal declaration or by the appointment of a successor.<sup>6</sup>

So where the written resignation of the officer, intended to

<sup>1</sup> Acceptance of the resignation, either expressly or impliedly, held necessary.

<sup>2</sup> *Edwards v. United States*, 103 U. S. 471 (construing the rule in *Michigan*); *State v. Clayton*, 27 Kans. 442, 41 Am. Rep. 418; *Rogers v. Slonaker*, 32 Kans. 191; *Hoke v. Henderson*, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677; *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 248; *State v. Ferguson*, 31 N. J. L. 107.

See *Oregon v. Jennings*, 119 U. S. 74.

<sup>3</sup> Acceptance of the resignation is held unnecessary in *United States v. Wright*, 1 McLean (U. S. C. C.) 509; *People v. Porter*, 6 Cal. 26; *State v. Clarke*, 3 Nev. 519; *State v. Mayor*, 4 Neb. 260; *State v. Fitts*, 49 Ala. 402; *Bunting v. Willis*, 27 Gratt. (Va.) 144, 21 Am. Rep. 338; See also *Olmsted v. Dennis*, 77 N.

Y. 378; *United States v. Justices*, 10 Fed. Rep. 460.

Acceptance presumed where resignation was filed in proper office without objection: *Pace v. People*, 50 Ill. 432; *Gates v. Delaware County*, 12 Iowa 405.

<sup>4</sup> In *Edwards v. United States*, 103 U. S. 471, mandamus was awarded to compel the performance of official duty, although the officer had tendered his resignation which had not been accepted.

And to the same effect is *Thompson v. United States*, 103 U. S. 480.

<sup>5</sup> But see *Olmsted v. Dennis*, 77 N. Y. 378.

<sup>6</sup> *Rogers v. Slonaker*, 32 Kans. 191; See also *Bunting v. Willis*, 27 Gratt. (Va.) 144, 21 Am. Rep. 338.

<sup>7</sup> *Edwards v. United States*, 103 U. S. 471; *Willcock, Corporations* 239

operate as such, was duly filed in the proper office without objection, and was endorsed as his resignation, it was held that this was a sufficient acceptance, if any was required.<sup>1</sup>

§ 416. When Officer holds until Successor is chosen notwithstanding Acceptance of his Resignation.—Where the law expressly provides, as it does in many States, that an officer shall continue to hold his office until his successor is chosen and qualified, he will, notwithstanding the acceptance of his resignation, continue in office and be charged with all its duties and responsibilities until such successor is chosen and qualified.<sup>2</sup>

§ 417. Withdrawal of Resignation.—“A prospective resignation,” it is said, “may, in point of law, amount but to a notice of intention to resign at a future day, or a proposition to so resign; and, for the reason, that it is not accompanied by a giving up of the office—possession is still retained and may not necessarily be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation—may withdraw his proposition to resign. He certainly can do this at any time before it is accepted; and after it is accepted, he may make the withdrawal by the consent of the authority accepting, where no new rights have intervened.”<sup>3</sup>

But in another case in the same court it is held that where the resignation is intended to take effect immediately, and has been delivered with that purpose to the officer authorized to receive it, it can not be withdrawn even with the consent of the latter.<sup>4</sup> And the same ruling has been made in other cases.<sup>5</sup>

So, certainly, an accepted resignation can not be withdrawn,<sup>6</sup> unless, perhaps, in those cases where the power to accept and the power to fill the vacancy are in the same officer or board.

<sup>1</sup> *Gates v. Delaware County*, 12 Iowa, 405; *Pace v. People*, 50 Ill. 433.

<sup>2</sup> *Badger v. United States*, 98 U. S. 599; *Jones v. Jefferson*, 66 Tex. 576; *People v. Barnett Tp.* 100 Ill. 383. But see *Amy v. Watertown*, 180 U. S. 301.

<sup>3</sup> *Biddle v. Willard*, 10 Ind. 62. To same effect, *State v. Boecker*, 56 Mo. 17. See also *Rogers v. Slonaker*, 33

Kans. 191; *State v. Clarke*, 8 Nev. 519.

<sup>4</sup> *State v. Hauss*, 43 Ind. 105, 18 Am. Rep. 334.

<sup>5</sup> *Yonkey v. State*, 37 Ind. 236, 241; *Queen v. Mayor*, 14 Q. B. Div. 908, 38 Eng. Rep. 68.

<sup>6</sup> *Pace v. People*, 50 Ill. 433; *Gates v. Delaware County*, 12 Iowa, 405; *State v. Fitts*, 49 Ala. 402.

§ 418. *Resignation while insane.*—If the resignation of an officer be made by him while insane, but is accepted by the proper authority in ignorance of the insanity, and his successor is duly appointed, the loss of the office must fall upon him who resigned it.<sup>1</sup>

<sup>1</sup> *Blake v. United States*, 14 Ct. Cl. 462.

## CHAPTER IV.

### BY ACCEPTANCE OF ANOTHER OFFICE.

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| <p>§ 419. In general.</p> <p>I. BY ACCEPTANCE OF INCOMPATIBLE OFFICE.</p> <p>420. Acceptance of second Office incompatible with first vacates first.</p> <p>421. Same Subject—Exception.</p> <p>422. What constitutes Incompatibility.</p> <p>423. Illustrations of incompatible Offices.</p> <p>424. Illustrations of Offices not incompatible.</p> <p>425. No Proceeding necessary to enforce Vacation.</p> | <p>§ 426. Acceptance of second Office is conclusive of Officer's Election to hold that one.</p> <p>II. BY THE ACCEPTANCE OF A FORBIDDEN OFFICE.</p> <p>427. In general.</p> <p>428. Distinction between Eligibility to Election and Power to hold.</p> <p>429. Acceptance of forbidden Office vacates first.</p> <p>430. Same Subject—Not when first Office held under different Government.</p> <p>431. Same Subject—Illustrations of the Rule.</p> |
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§ 419. In general.—It is contrary to the policy of the law that the same individual should undertake to perform inconsistent and incompatible duties. So also, as has been seen, it is frequently provided by constitutions and statutes that officers holding offices of one class or under one authority, shall not also hold an office of a different class or created by a different authority. Prohibitions of the first kind arise under the common law; those of the second are the creature of express constitutional or statutory enactment.

The subject will, therefore, be considered under two heads:

- I. By the acceptance of an incompatible office.
- II. By the acceptance of a forbidden office.

#### I.

##### BY ACCEPTANCE OF INCOMPATIBLE OFFICE.

§ 420. Acceptance of second Office incompatible with first, vacates first Office.—It is a well settled rule of the common law



that he who, while occupying one office, accepts another incompatible with the first, *ipso facto* absolutely vacates the first office and his title is thereby terminated without any other act or proceeding.<sup>1</sup> That the second office is inferior to the first does not affect the rule.<sup>2</sup> And even though the title to the second office fail, as where the election was void, the rule is still the same, nor can the officer then regain possession of his former office to which another person has been appointed or elected.<sup>3</sup>

§ 421. **Same Subject—Exception.**—But an exception is made to the general rule in those cases in which the officer can not vacate the first office by his own act, upon the principle that he will not be permitted to thus do indirectly what he could not do directly. Such an acceptance, it is said, though it may be ground for amotion, does not operate as an *absolute avoidance* in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment.

“Upon principle, not conflicting with any of the authorities,” says PARKE J., in stating this exception, “it seems that an officer cannot avoid his office by accepting another, unless his office be such as he could determine by his own act simply, or unless that authority concurs in the new appointment which could accept the surrender of or amove from the old one.”<sup>4</sup>

Such a concurrence, however, is implied where the power authorized to accept his surrender of the first office appoints him to the second.<sup>5</sup>

§ 422. **What constitutes Incompatibility.**—This incompati-

<sup>1</sup> Milward v. Thatcher, 2 T. R. 81; Rex v. Patteson, 4 B. & Ad. 9; Rex v. Hughes, 5 B. & C. 886; Rex v. Tizard, 9 B. & C. 418; State v. Brinkerhoff, 66 Tex. 45; Pooler v. Reed, 73 Me. 129; State v. Dellwood, 33 La. Ann. 1229; State v. West, 33 La. Ann. 1261; Stubbs v. Lee, 64 Me. 195, 18 Am. Rep. 251; State v. Goff, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. Rep. 226; State v. Buttz, 9 S. C. 156; People v. Carrique, 2 Hill (N. Y.) 98; Peo-

ple v. Hanifan, 96 Ill. 420; Cotton v. Phillips, 56 N. H. 220; Kenney v. Goergen, 86 Minn. 190; Magie v. Stoddard, 25 Conn. 565, 68 Am. Dec. 375; People v. Nostrand, 46 N. Y. 375; State v. Brinkerhoff, 66 Tex. 45; Blencourt v. Pasker, 27 Tex. 562; *Ex parte*, Call, 2 Tex. App. 497.

<sup>2</sup> Milward v. Thatcher, 2 T. R. 81.

<sup>3</sup> Rex v. Hughes, 5 B. & C. 886.

<sup>4</sup> Rex v. Patteson, 4 B. & Ad. 9.

<sup>5</sup> State v. Brinkerhoff, 66 Tex. 45.

bility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.<sup>1</sup>

It seems to be well settled that the mere physical impossibility of one person's performing the duties of the two offices as from the lack of time or the inability to be in two places at the same moment, is not the incompatibility here referred to.<sup>2</sup> It must be an inconsistency in the functions of the two offices, as judge and clerk of the same court, claimant and auditor, and the like.<sup>3</sup> "Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not," says FOLGER J., "that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, *per se*,

<sup>1</sup> Bryan v. Cattell, 15 Iowa 538; People v. Green, 58 N. Y. 295; Stubbs v. Lee, 64 Me. 195, 18 Am. Rep. 251; State v. Buttz, 9 S. C. 156; People v. Green, 5 Daly (N. Y.) 254; State v. Goff, 15 R. I. 505, 9 Atl. Rep. 226, 2 Am. St. Rep. 921; State v. Brown, 5 R. I. 1, 11; State v. Feibleman, 28 Ark. 424.

<sup>2</sup> The definition given in Bacon's Abridgement, Vol. 8, tit. Offices. K. "Offices are said to be incompatible and inconsistent so as to be executed by the same person, when from the multiplicity of business in them they can not be executed with care and

ability; or when, their being subordinate and interfering with each other, it induces a presumption they can not be executed with impartiality and honesty," and that by BAGLEY, J., in Rex v. Tizzard, 9 B. & C. 418, 421, that "two offices are incompatible where the holder can not in every instance discharge the duties of each," seem in some degree contrary to the text; but the rule in the text is supported by the best considered authorities. See cases cited in preceding note.

<sup>3</sup> See cases cited in note 1 of this section.

have the right to interfere, one with the other, before they are incompatible at common law."<sup>1</sup>

§ 423. **Illustrations of incompatible Offices.**—In accordance with the rule of the last section it is held that the following offices are incompatible and that the acceptance of the second vacates the first: that of town clerk and that of alderman;<sup>2</sup> that of trial justice and that of deputy sheriff;<sup>3</sup> that of justice of the peace and that of constable,<sup>4</sup> sheriff, deputy sheriff or coroner;<sup>5</sup> that of deputy sheriff and that of justice of the peace;<sup>6</sup> that of a prudential committee and that of auditor of a school district;<sup>7</sup> that of state solicitor and that of member of congress;<sup>8</sup> that of councilman and that of city marshal;<sup>9</sup> that of justice of the district court and that of deputy sheriff;<sup>10</sup> that of postmaster and that of judge of the county court.<sup>11</sup>

§ 424. **Illustrations of Offices not incompatible.**—On the other hand the following offices have been held to be not incompatible: that of school director and that of judge of elections;<sup>12</sup> that of clerk of a school district and that of collector of the district;<sup>13</sup> that of member of the assembly and that of clerk of the court of special sessions;<sup>14</sup> that of supervisor of a county and that of deputy clerk of the circuit court of the county;<sup>15</sup> that of clerk of the district court and that of court commissioner;<sup>16</sup> that of crier and that of messenger of a court.<sup>17</sup>

§ 425. **No proceeding necessary to enforce Vacation.**—As stated in the general rule, the acceptance of the second office

<sup>1</sup> In *People v. Green*, 58 N. Y. 295.

<sup>2</sup> *Rex v. Tizzard*, 9 B. & C. 418.

<sup>3</sup> *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251.

<sup>4</sup> *Magie v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375; *Pooler v. Reed*, 73 Me. 129.

<sup>5</sup> *Opinion of Judges*, 3 Maine, 496.

<sup>6</sup> *Wilson v. King*, 3 Littell (Ky.) 457, 14 Am. Dec. 84.

<sup>7</sup> *Cotton v. Phillips*, 56 N. H. 220.

<sup>8</sup> *State v. Buttz*, 9 S. C. 156.

<sup>9</sup> *State v. Hoyt*, 2 Oregon, 246.

<sup>10</sup> *State v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. Rep. 226.

<sup>11</sup> *Hoglan v. Carpenter*, 4 Bush (Ky.) 89.

<sup>12</sup> *In re District Attorney*, 11 Phila. 645.

<sup>13</sup> *Howland v. Luce*, 16 Johns. (N. Y.) 185.

<sup>14</sup> *People v. Green*, 58 N. Y. 295, affirming 5 Daly 254.

<sup>15</sup> *State v. Feibleman*, 28 Ark. 424.

<sup>16</sup> *Kenney v. Goergen*, 36 Minn. 190, 81 N. W. Rep. 210.

<sup>17</sup> *Preston v. United States*, 37 Fed. Rep. 417.

*ipso facto* vacates the first. No proceeding, therefore, by *quo warranto* or otherwise, is necessary in order to declare or complete the vacation of the first office, but it may be at once filled again either by appointment or election as the law provides.<sup>1</sup>

§ 426. Acceptance of second Office is conclusive of Officer's Election to hold that one.—Upon his election or appointment to the second office, the officer has a right to elect which of the two he will have and retain, but his election must be deemed to be made when he accepts and qualifies for the second.<sup>2</sup>

As is said by APPLETON, C. J., "Where one has two incompatible offices, both can not be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the office holder to determine. The general rule, therefore, that the acceptance of and qualification for, an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public."<sup>3</sup>

## II.

### BY THE ACCEPTANCE OF A FORBIDDEN OFFICE.

§ 427. In general.—From motives of public policy, it is frequently provided in the state constitutions and statutes that a person shall not at the same time hold an office of trust or profit both under the State and under the Federal government; that persons holding judicial offices shall not at the same time hold other offices of trust or profit; that a person shall not at the same time hold two offices of trust or profit, and the like.

These provisions often cover substantially the same ground as the common law prohibition against holding incompatible offices;

<sup>1</sup> *Rex v. Trelawney*, 3 Burr 1615; *Milward v. Thatcher*, 2 T. R. 81; *Rex v. Tizzard*, 9 B. & C. 418; *People v. Hanifan*, 96 Ill. 420; *State v. Dellwood*, 33 La. Ann. 1229; *People v. Carrigue*, 2 Hill (N. Y.) 98; *State v. Butts*, 9 S. C. 156; *Shell v. Cousins*, 77 Va. 328; *State v. Brinkerhoff*, 66 Tex. 45; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *Cotton v. Phillips*, 56 N. H. 220; *Pooler v. Reed*, 78 Me. 129.

<sup>2</sup> *State v. Brinkerhoff*, 66 Tex. 45.

<sup>3</sup> *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251.

but they also, in many cases, go further than that and arbitrarily prohibit the holding of two offices which the common law might not declare incompatible.

§ 428. **Distinction between Eligibility and Power to hold.**—As has been seen in an earlier portion of the work, it is frequently declared that persons holding one office shall be ineligible to election to another, either generally or of a certain kind. These provisions being held to incapacitate the incumbent of the first office to *election* to the second, it follows that any attempted election to the second is void and that if, by color of it, he attempts to hold the second office he will be removed from it.<sup>1</sup> It is thus the second office which is vacated instead of the first.

In California, however, under a constitutional provision that "no person holding any lucrative office under the United States or any other power, shall be eligible to any civil office of profit under this State," it is held that this means eligibility to *hold* office as well as to be elected to it, and hence disqualifies a person holding a civil office of profit under the state, *e. g.* that of county supervisor, from continuing to hold this office after he had received and entered upon a lucrative office under the United States, as that of postmaster.<sup>2</sup>

§ 429. **Acceptance of forbidden Office vacates first.**—Where, however, it is the *holding* of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates *ipso facto* to absolutely vacate the first.<sup>3</sup>

No judicial determination is therefore necessary to declare the

<sup>1</sup> Crawford v. Dunbar, 52 Cal. 36; Vogel v. State, 107 Ind. 374; *In re Corliss*, 11 R. I. 638, 28 Am. Rep. 538.

<sup>2</sup> People v. Leonard, 73 Cal. 230, 14 Pac. Rep. 853.

<sup>3</sup> People v. Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; Shell v. Cousins, 77 Va. 323; State v. Newhouse, 29 La. Ann. 824; State v. Arata, 33 La. Ann. 193; State v. Dellwood, 33 La. Ann.

1229; State v. West, 33 La. Ann. 1261; State v. Draper, 45 Mo. 355; Dickson v. People, 17 Ill. 191; Folts v. Kerlin, 105 Ind. 231, 55 Am. Rep. 197; Dailey v. State, 8 Blackf. (Ind.) 329; Creighton v. Piper, 14 Ind. 183; State v. Kirk, 44 Ind. 401, 15 Am. Rep. 239; Lucas v. Shepherd, 16 Ind. 368; Howard v. Shoemaker, 35 Ind. 111.

vacancy of the first, but the moment he accepts the new office the old one becomes vacant. As is said in one case, "His acceptance of the one was an absolute determination of his right to the other, and left him 'no shadow of title, so that neither *quo warranto* nor amotion was necessary.'"<sup>1</sup>

§ 430. **Same Subject—Not when first Office held under different Government.**—But an exception is made to this rule where the first office is held under a different government from that which conferred the second.

Thus in Indiana, under a constitutional declaration that no person shall "hold more than one lucrative office at the same time," it was held that where one who at the time of his election to one lucrative office, that of township trustee, holds another lucrative office, that of United States postmaster, he will be compelled to vacate the second office which he held under the State.<sup>2</sup>

"It is doubtless the general rule," said the court by ELLIOTT, J., "that where a man accepts an office held under the State, he vacates another held under the same sovereignty."<sup>3</sup>

But the reason of the rule fails when applied to offices held under different sovereignties, and where the reason of the rule fails, so also does the rule. There is reason for the rule where the offices emanate from the same government, but none where the offices are created by different governments. The National law neither creates nor governs a State office; neither inducts the officer into office nor expels him from it; neither fixes his qualifications nor prescribes his disabilities. On the other hand, the State law exerts no dominion over the Federal officer as an officer, neither prescribes his qualifications nor declares his disabilities, and it is therefore logically inconceivable that the acceptance of an office existing under a State law vacates an office

<sup>1</sup>People v. Brooklyn, 77 N. Y. 508, 33 Am. Rep. 659; Whiting v. Carrique, 2 Hill (N. Y.) 93; People v. Nostrand, 46 N. Y. 381; People v. Green, 58 N. Y. 304.

<sup>2</sup>Foltz v. Kerlin, 105 Ind. 221, 55 Am. Rep. 197.

<sup>3</sup>Citing Dalley v. State, 8 Blackf.

(Ind.) 329; Lucas v. Shepherd, 16 Ind. 368; Creighton v. Piper, 14 Ind. 183; Howard v. Shoemaker, 35 Ind. 111; Cotton v. Phillips, 56 N. H. 220; Milward v. Thatcher, 2 T.R. 81; People v. Hanifan, 96 Ill. 420; Stubbs v. Lee, 64 Me. 195, 18 Am. Rep. 251; Shell v. Cousins, 77 Va. 328.

existing under a National law. Where, as here, a man elected to a State office persists in retaining a Federal office, actually remains in it, enjoying its emoluments and discharging its duties, he does not, in legal contemplation and certainly not in fact, vacate it by entering into an office existing under the laws of the State, and for this plain reason the laws of the State do not operate upon Federal offices. Our laws do not extend to offices created by the general government, and no act, that an officer acting under our laws can do, can vacate an office upon which our laws do not operate. Nothing done under our laws can operate where our laws are without effect. We must therefore hold that a man can be expelled from a State office who persists in holding one given him by the Federal government, or we must concede that the courts of Indiana cannot control a citizen who assumes to hold office in direct violation of the Constitution. This concession will not be made."

But this exception made by the court must, it is believed, be limited to the exact state of facts before the court, *i. e.* where the Federal office is accepted first, for if the order of events had been reversed and the Federal office had been accepted second, the court would have had no difficulty in declaring the first vacated under the general rule without making the exception in its application where the offices are held under different sovereignties. And the cases are numerous in which under express provisions the State office has been held vacated by the subsequent acceptance of the Federal office.<sup>1</sup>

§ 431. **Same Subject—Illustrations of the Rule.**—The general rule may be illustrated by the following applications of it: Where the constitution provides that no person holding any lucrative office under the State; shall be a member of the general assembly, one who accepts an election to the assembly while holding the office of circuit judge vacates the latter office;<sup>2</sup> where the constitution provides that no person holding an office of honor or profit under the United States shall hold any office of honor or profit under the State, a person who is a director of

<sup>1</sup> See *Dickson v. People*, 17 Ill. 191; *Tex.* 387; *State v. Butts*, 9 S. O. 156.  
*People v. Brooklyn*, 77 N. Y. 508, 33  
*Am. Rep.* 659; *State v. De Gress*, 58      <sup>2</sup> *State v. Draper*, 45 Mo. 355.

a State deaf and dumb asylum, vacates this office when he accepts that of United States marshal ;<sup>1</sup> where the constitution prohibits one person from holding two lucrative offices at the same time, one who holds the office of county recorder vacates it if he accepts that of county commissioner,<sup>2</sup> or, if holding that of county commissioner, vacates it upon accepting that of deputy treasurer,<sup>3</sup> or, if holding that of prison director, he vacates it upon accepting that of mayor;<sup>4</sup> under a constitutional provision that no person shall hold more than one office of trust or profit at the same time, the office of jury commissioner is vacated by accepting that of police commissioner,<sup>5</sup> member of school board or tax assessor,<sup>6</sup> and that of member of the board of health is vacated by accepting that of jury commissioner;<sup>7</sup> where the constitution provides that "sheriffs shall hold no other office," the acceptance of any second office vacates the first ;<sup>8</sup> *a fortiori*, where the charter of a city prohibits an alderman from holding any other office, and provides that by his election to and acceptance of another, his office as alderman shall immediately become vacant, an alderman who is elected to Congress and accepts the office *ipso facto* vacates his office of alderman.<sup>9</sup>

<sup>1</sup> *Dickson v. People*, 17 Ill. 191.<sup>2</sup> *State v. Dellwood*, 33 La. Ann.<sup>3</sup> *Dailey v. State*, 8 Blackf. (Ind.) 339.1239; *State v. West*, 33 La. Ann. 1261.<sup>4</sup> *Lucas v. Shepherd*, 16 Ind. 363.<sup>5</sup> *State v. Arata*, 32 La. Ann. 193.<sup>6</sup> *Howard v. Shoemaker*, 35 Ind. 111.<sup>7</sup> *Shell v. Cousins*, 77 Va. 328.<sup>8</sup> *State v. Newhouse*, 29 La. Ann. 324.<sup>9</sup> *People v. Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659.



## CHAPTER V.

## BY ABANDONMENT OF OFFICE.

§ 433. In general—What included in this Chapter.

I. BY REFUSING OR NEGLECTING TO QUALIFY.

438. Mere Delay in qualifying no Abandonment.

439. Refusal or Neglect to qualify at all vacates Office.

II. BY REFUSING OR NEGLECTING TO PERFORM DUTIES.

440. Continued Refusal or Neglect to perform Duties constitutes Abandonment.

441. Judgment of Ouster necessary.

III. BY REMOVAL FROM THE DISTRICT.

442. Officer usually required in

District for which he was elected.

443. Permanent Removal from District operates as Abandonment.

444. Same Subject—Illustrations.

445. Office once abandoned cannot be resumed.

IV. BY ENGAGING IN REBELLION.

446. Officer who rebels against Government forfeits Office.

V. BY DEATH.

447. Death of single Officer creates Vacancy.

448. Survivor of two or more Officers may execute Office.

§ 432. In general—What included in this Chapter.—An office may also become vacant by its abandonment by the officer. Such an abandonment may be evidenced by a variety of acts and events, and, while the classification may not be the best possible, there will, for convenience sake, be treated under this head, the the vacation or abandonment of the office:—

- I. By refusing or neglecting to qualify;
- II. By refusing or neglecting to perform the duties;
- III. By removing from the district;
- IV. By engaging in rebellion;
- V. By death.

I.

BY REFUSING OR NEGLECTING TO QUALIFY.

§ 433. Mere Delay in qualifying no Abandonment.—As has been seen, statutes requiring qualification for office usually prescribe that the oath shall be taken, and the bond, if any, shall be given within a fixed time after the election or appointment, and declare that a failure to do so shall render the office vacant.<sup>1</sup> But, as has also been seen, these statutes are usually construed to be *directory* only and not mandatory, and that it is therefore held that while the neglect to qualify within the time prescribed may be a cause for forfeiture and may render the officer's title voidable and defeasible, it does not *ipso facto* operate as an absolute vacation of the office.<sup>2</sup> He is at least an officer *de facto*.<sup>3</sup>

If, therefore, notwithstanding the delay, the officer afterwards qualifies, and the public authorities, charged with that duty, accept and approve of his qualification, his default is waived, and his title becomes perfect.<sup>4</sup>

Mere delay, then, in qualifying can not be deemed to be an abandonment of the office.<sup>5</sup>

*A fortiori* is this so where the delay is occasioned not by the fault of the officer but by that of the public authorities, as by a wilful and unjust refusal to issue his certificate<sup>6</sup> or approve his bond.<sup>7</sup>

§ 434. Refusal or Neglect to qualify at all vacates Office.—But the continued and absolute refusal or neglect to qualify at all and to enter upon the discharge of his duties, must operate, so far as the delinquent himself is concerned, in vacating his title to the office.<sup>8</sup> The office, however, does not ordinarily be-

<sup>1</sup> See *ante*, § 253.

<sup>2</sup> See *ante*, § 265.

<sup>3</sup> See *ante*, § 329.

<sup>4</sup> *City of Chicago v. Gage*, 95 Ill. 598, 85 Am. Rep. 182; *People v. Holley*, 12 Wend. (N. Y.) 481; *State v. Churchill*, 41 Mo. 41; *State v. Porter*, 7 Ind. 204; *Ross v. Williamson*,

44 Ga. 501; *Cronin v. Gundy*, 16 Hun (N. Y.) 520; *State v. Toomer*, 7 Rich. (S. C.) 216.

<sup>5</sup> *State v. Colvig*, 15 Oreg. 57; *State v. Peck*, 80 La. Ann. 1. 280.

<sup>6</sup> *People v. Mayworm*, 5 Mich. 146.

<sup>7</sup> *State v. Dahl*, 65 Wis. 510.

<sup>8</sup> See *ante*, § 266.

come vacant inasmuch as the prior incumbent usually holds over.<sup>1</sup>

## II.

### BY REFUSING OR NEGLECTING TO PERFORM DUTIES.

§ 435. **Continued Refusal or Neglect to perform Duties constitutes Abandonment.**—Public offices are held upon the implied condition that the officer will diligently and faithfully execute the duties belonging to them, and while a temporary or accidental failure to perform them in a single instance or during a short period will not operate as an abandonment,<sup>2</sup> yet if the officer refuses or neglects to exercise the functions of the office for so long a period as to reasonably warrant the presumption that he does not desire or intend to perform the duties of the office at all, he will be held to have abandoned it, not only when his refusal to perform was wilful,<sup>3</sup> but also where, while he

<sup>1</sup> See *ante*, § 397.

<sup>2</sup> Thus a mere temporary inability by sickness to perform the duties, though continuing for fifty days, will not amount to an abandonment. *State v. Baird*, 47 Mo. 301. See also *State v. Allen*, 21 Ind. 516, 38 Am. Dec. 367.

<sup>3</sup> *People v. Hartwell*, 67 Cal. 11; *King v. Rook*, Cro. Car. 491; *Rex v. Wells*, 4 Burr. 2004; *State v. Allen*, 21 Ind. 516, 38 Am. Dec. 367; *People v. Kingston*, T. R. Co. 23 Wend. (N. Y.) 193, 35 Am. Dec. 551. In this case, C. J. NELSON said:

"It is laid down as a general principle, that if an officer acts contrary to the nature and duty of his office, or refuses to act at all, he forfeits it; and, if granted by patent, he may be turned out by *scire facias*: 5 Bac. 210, 212, tit. Offices and Officers; *Earl of Shrewsbury's Case*, 9 Co. 50; *Sir George Reynel's Case*, 9 Co. 98; for in every grant of an office there is an implied condition that the grantee will diligently and faithfully execute

the duties of it. Lord Coke says, in the *Earl of Shrewsbury's Case*, 9 Coke 50, that there are three causes of forfeiture: 1. Abuser; 2. Non-user; and 3. Refusal. The first is where the sheriff or jailer permits a voluntary escape, or abuses the prisoners, etc.; or a forester or parker cuts wood, unless for necessary brush. The second, where the officer is concerned in the administration of justice, or of the commonwealth, and neglects to attend upon his duties; and the third, where he is bound to attend upon request, and refuses; in either case, the office is forfeited. Sickness is an excuse; but in the case of a searcher of a port, voluntary absence when search should be made, is not, *King v. Rooks*, Cro. Car. 491. And Lord Holt held that the voluntary absence of a recorder of Ipswich, he holding a public office, was cause of forfeiture, though no inconvenience ensues: *Queen v. Bailiffs of Ipswich*, 2 Ld. Raym. 1287. Mr. Hawkins doubts this, but adds that he who so far neg-

intended to vacate the office, it was because he in good faith but mistakenly supposed he had no right to hold it.<sup>1</sup>

Where, however, while desiring and intending to hold the office if he has a legal right to do so, and with no desire or intention wilfully or purposely to abandon it, he vacates it in deference to the requirements of a public statute which is afterwards declared unconstitutional, such a surrender will not be deemed an abandonment, and upon the overthrow of the law, during his term, he may recover the office.<sup>2</sup>

ffects a public office as plainly to appear to take no care of it, should rather be immediately displaced than the public be in danger of suffering damage: 1 Hawk. 311, b. 1, c. 67, sec. 1. Lord Mansfield, in *Rex v. Wells Corporation*, 4 Burr. 2004, said that a general neglect or refusal to attend to the duties of a public office is a reason of forfeiture—a determined neglect or wilful refusal—but a single instance of omitting to attend when no particular business was expected, nor in fact happened, is a very different case. It is said that one negligent escape by a sheriff is not a cause of forfeiture, but that one voluntary escape is; so of two or more negligent escapes: 5 Bac. 210; 4 Burr. 2007. Thus it will be seen that the franchise of an office held upon the implied condition of diligently and faithfully executing the duties belonging to it, may be forfeited by general neglect, or wilful refusal to perform. The ingredient of a bad or corrupt motive need not enter into the cause: it is enough if the duty is neglected or designedly omitted.”

<sup>1</sup> As where the failure to perform was owing to the mistaken opinion that another had been elected and the officer made no attempt to perform for a period of two years. *People v. Hartwell*, 67 Cal. 11.

<sup>2</sup> *Turnipseed v. Hudson*, 50 Miss. 429, 19 Am. Rep. 15. In this case

plaintiff was elected to an office in 1871 for the term of four years. In 1873 an act was passed providing for an election in November of that year to fill said office. Among the candidates for such election were the plaintiff and defendant, who entered into an agreement to abide the result of a primary election. At the primary election the defendant was selected and in November he was elected, and thereupon qualified and took possession of the office, plaintiff surrendering the same. The statute was afterwards decided to be unconstitutional and the election void, and plaintiff brought this action to recover possession of the office. *Held* (1), that the plaintiff was not estopped by the agreement with the defendant. (The court cite and discuss upon this point *Alexander v. Walter*, 8 Gill. (Md.) 239, 50 Am. Dec. 688; *Dezell v. Odell*, 3 Hill (N. Y.) 215, 38 Am. Dec. 628; *Taylor v. Zepp*, 14 Mo. 482, 55 Am. Dec. 118; *Phillips v. Cooper*, 50 Miss. 722; *Holman v. Johnson*, Cowp. 848; *Langdon v. Doud*, 10 Allen (Mass.) 483; *Howard v. Hudson*, 2 El. & B. 1; *Audenried v. Betteley*, 5 Allen (Mass.) 883, 81 Am. Dec. 755; *Plumer v. Lord*, 9 Allen (Mass.) 455, 85 Am. Dec. 773; *Jorden v. Money*, 5 H. L. Cas. 185; *White v. Walker*, 81 Ill. 423; *Harris v. Brooks*, 21 Pick. (Mass.) 195, 32 Am. Dec. 252; *Colton v. Beardaley*, 83 Barb. N. Y. 29; *Regina*

§ 486. **Judgment of Ouster necessary.**—But while such an abandonment is clearly a cause for a forfeiture, it is ordinarily held that it does not of itself create a completed vacancy, but that a judicial determination of the fact is necessary to render it conclusive.<sup>1</sup>

### III.

#### BY REMOVAL FROM THE DISTRICT.

§ 437. **Officer usually required to reside in District for which he was elected.**—As has been seen in an earlier section,<sup>2</sup> it is usually provided that public officers shall reside in the district for and from which they are elected, and the statutes generally provide further that the office shall become vacant upon their ceasing to reside within said district. The reasons for these provisions are found in obvious requirements of public policy.

§ 438. **Permanent Removal from District operates as Abandonment.**—Where the law thus requires the officer to reside within the district which he represents, and *a fortiori* so where it expressly declares that his removal from the district shall create a vacancy, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result.<sup>3</sup>

But a merely temporary removal for a limited time and with no intention to abandon or surrender the office or to cease to perform its duties, will not have this effect.<sup>4</sup>

§ 439. **Same Subject—Illustrations.**—Thus, where a county officer leaves the county with his family with the intention not to return,<sup>5</sup> or goes to another State with the intention of there

<sup>1</sup> *Greene*, 2 Q. B. 460; *Butts v. Wood*, 37 N. Y. 817; *Gray v. Hook*, 4 N. Y. 449; (2), that such agreement and the surrender of the office by plaintiff did not amount to an abandonment or resignation.

<sup>2</sup> *Van Orsdall v. Hazard*, 8 Hill (N. Y.) 248.

<sup>3</sup> See *ante*, § 488.

<sup>4</sup> *Yonkey v. State*, 27 Ind. 286; *Curry v. Stewart*, 8 Bush (Ky.) 560;

*State v. Allen*, 21 Ind. 516, 88 Am. Dec. 367; *Prather v. Hart*, 17 Neb. 598.

<sup>5</sup> *State v. Graham*, 26 La. Ann. 568, 21 Am. Rep. 551; *McGregor v. Allen*, 33 La. Ann. 870; *Curry v. Stewart*, 8 Bush (Ky.) 560; *People v. Parker*, 8 Neb. 409, 19 Am. Rep. 684; *Yonkey v. State*, 27 Ind. 286.

<sup>6</sup> *Prather v. Hart*, 17 Neb. 598.

making it his home,<sup>1</sup> or voluntarily enlists in the military service of the United States,<sup>2</sup> he is held to have vacated his office; but a mere temporary absence, as to procure medical treatment<sup>3</sup> or to engage in business for a limited time,<sup>4</sup> or to fill a temporary appointment,<sup>5</sup> where the office may be and is filled by a deputy, does not operate to vacate it.

§ 440. Office once abandoned cannot be resumed.—When the vacancy has once become complete by the abandonment of the officer, it can not be resumed by him,<sup>6</sup> nor can he again possess himself of it by an accidental, voluntary or forcible reoccupancy.<sup>7</sup>

#### IV.

##### BY ENGAGING IN REBELLION.

§ 441. Officer who rebels against Government forfeits Office.—Where a public officer holding an office under the government, rebels against that government and seeks or aids its overthrow, he will be thereby deemed to have forfeited and vacated his office, and no judicial determination is necessary to determine the fact of the forfeiture.<sup>8</sup>

#### V.

##### BY DEATH.

§ 442. Death of single Officer creates vacancy.—The death of the incumbent of an office, which is by law to be filled by one person only, necessarily renders the office vacant.<sup>9</sup> The fact of the vacancy in such a case and the means to be pursued to fill it, are usually made the subject of statutory enactment.

<sup>1</sup> See *Yonkey v. State*, 27 Ind. 236.

<sup>2</sup> *State v. Allen*, 21 Ind. 517.

<sup>3</sup> *McGregor v. Allen*, 33 La. Ann. 870.

<sup>4</sup> *Curry v. Stewart*, 8 Bush (Ky.) 560.

<sup>5</sup> *Yonkey v. State*, 27 Ind. 236.

<sup>6</sup> *Yonkey v. State*, 27 Ind. 236, citing *Hedley v. Commissioners*, 4 Blackf. (Ind.) 116; *State v. Jones*, 19

Ind. 356; *State v. Allen*, 21 Ind. 516, 83 Am. Dec. 367.

<sup>7</sup> *State v. Allen*, 21 Ind. 516, 83 Am. Dec. 367, citing *Rex v. Harria*, 1 B. & Ad. 936; *Page v. Hardin*, 8 B. Mon. (Ky.) 648.

<sup>8</sup> *Chisholm v. Coleman*, 43 Ala. 204, 94 Am. Dec. 678.

<sup>9</sup> *People v. Cowles*, 13 N. Y. 350.

§ 443. **Survivor of two or more Officers may execute Office.**  
—But where the authority to be exercised is conferred upon two or more officers a different rule applies. While the death of one, of course, terminates his authority and leaves a vacancy to be filled, the whole office is not vacant but, unless the joint action of all is expressly required, the survivors may execute the office. As is said in one case, "A grant of power, in the nature of a public office, to several, does not become void upon the death or disability of one or more. Such a grant of power is not in the nature of a private franchise which, when granted to two without words of survivorship, might not by the rules of the common law, survive the death of one."<sup>1</sup>

<sup>1</sup> People v. Palmer, 52 N. Y. 84;  
Downing v. Rugar, 21 Wend. (N. Y.)  
178, 34 Am. Dec. 223.

See also Mechem on Agency, § 73.  
<sup>2</sup> People v. Palmer, 52 N. Y. 84.

## CHAPTER VI.

## BY REMOVAL FROM OFFICE.

## § 444. In general.

445. Power of Removal incident to Power of Appointment when Tenure of Office not fixed by Law.

446. Power to remove municipal Officers.

447. Power of removal in other Cases may be conferred by Law.

448. Power conferred may be absolute or conditional.

449. Consent of Senate or other Body may be required.

450. May be restricted to Removals for Cause.

451. Removals for political Reasons may be prohibited.

452. Power of Removal must be exercised within the Limits fixed.

§ 453. Power to remove does not include Power to suspend.

454. Necessity of Notice and Hearing before Removal.

455. Proceedings for Removal are judicial in their Nature.

456. Right of Courts to review the Proceedings.

457. For what conduct Removed.

458. Same Subject—Illustrations.

459. What constitutes a Removal—Implied Removal.

460. Notice of Removal must be given to the Officer.

461. Removal not effected by revoking Appointment.

462. But Governor may revoke Commission issued by Mistake.

§ 444. In general.—Offices may also become vacant by the removal of the incumbent. Removals may occur under a variety of circumstances; they may be (1) arbitrary, or (2) for cause; and the officer removed may have derived his powers (1) from an election by the people, or (2) by appointment by the executive; while his removal may have been (1) after notice and hearing, or (2) without hearing.

§ 445. Power of Removal incident to Power of Appointment when Tenure of Office not fixed by Law.—The question whether the power of removal from appointive offices is one which is incident to the power to appoint, is an important one in respect of which much difference of opinion has prevailed. Offices, even though appointive, are usually created to be held for a definite time, as for a given number of years, or during life or good



behavior. In some cases, however, no such tenure is fixed by law, and the officer must then hold, either expressly or implied, at the will or pleasure of the appointing power, or his tenure must be indefinite, and subject to no will but his own,—a construction which is entirely inconsistent with the spirit of our institutions.

Where, therefore, the tenure of the office is not fixed by law, and no other provision is made for removals, either by the constitution or by statute, it is said to be “a sound and necessary rule to consider the power of removal as incident to the power of appointment.”<sup>1</sup>

But this power of arbitrary removal is to be limited to these circumstances, and if the tenure is fixed by law,<sup>2</sup> or if the officer is appointed to hold during the pleasure of some other officer or board than that appointing him,<sup>3</sup> the appointing power cannot arbitrarily remove him.

§ 446. **Power to remove municipal Officers.**—“The power to remove a corporate officer from his office, for reasonable and just cause,” says Judge DILLON,<sup>4</sup> “is one of the common law incidents of all corporations. This doctrine, though declared before, has been considered as settled ever since Lord MANSFIELD’s judgment in the well known case of the *King v. Richardson*.<sup>5</sup> It is there denied that there can be no power of amotion unless given by charter or prescription, and the contrary doctrine asserted,—that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental.

But the power to amove, like every other incidental power, is

<sup>1</sup> *Ex parte Hennen*, 18 Peters (U.S.) 280, 259; *Newsome v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686; *People v. Hill*, 7 Cal. 97; *Smith v. Brown*, 59 Cal. 672; *People v. Shear*, 15 Pac. Rep. 92 (Cal.); *Williams v. Boughner*, 6 Cold. (Tenn.) 486; *Patton v. Vaughan*, 39 Ark. 211; *People v. Durston*, 3 N. Y. Supplement 522; *People v. Commissioners*, 78 N. Y. 487; *People v. Mayor*, 5 Barb. (N. Y.) 48. In *Dubuc v. Voss*, 19 La.

Ann. 210, 92 Am. Dec. 526, it is said that this rule cannot be deemed to apply to the governors of States, but this exception is not elsewhere followed.

<sup>2</sup> *Collins v. Tracy*, 36 Tex. 546; *Keenan v. Perry*, 24 Tex. 253; *People v. Hill*, 7 Cal. 97; *State v. Chatburn*, 68 Iowa 659, 50 Am. Rep. 760.

<sup>3</sup> *Carr v. State*, 111 Ind. 101.

<sup>4</sup> *Dillon’s Munic. Corp.* § 240.

<sup>5</sup> 1 Burr, 517.

incident to the corporation at large, and not to any select body or particular part of it, and unless delegated to a select body or part, it must be exercised by the whole corporation, and at a corporate assembly regularly and duly convened. The power to hold such an assembly is, however, implied in the power of motion."<sup>1</sup>

§ 447. **Power of Removal in other Cases may be conferred by Law.**—But it is a common provision in national, state and municipal governments that the president, governor, mayor or other officer shall have the power to remove for cause officers not only appointive but elective. Such a provision is indispensable to the proper exercise of the public functions and is clearly within the authority of the sovereign power.<sup>2</sup>

§ 448. **Power conferred may be absolute or conditional.**—The power of removal so conferred, like the power to appoint, may be absolute or conditional. It is absolute when it is vested in the unlimited discretion of the removing officer to be exercised at such time and for such reasons as the latter may deem proper and sufficient. It is conditional when the time, the manner or the reason is placed beyond the mere discretion of the removing officer. Thus—

§ 449. **Consent of Senate or other Body may be required.**—Except where the constitution or other paramount authority confers the power upon the executive alone, it is competent to require the consent of the senate, common council or other body to the removal as it is, in many cases, required for his appointment, and where such consent is required, a removal attempted without it is ineffectual.<sup>3</sup> Where the authority of removal is vested in the "appointing power" and the appointing power is vested in the governor by and with the advice and consent of the senate, the consent of the latter body is necessary to a removal.<sup>4</sup>

§ 450. **May be restricted to Removals for Cause.**—So it is frequently provided that the executive shall remove only for a specified cause or "for cause" generally. Where the cause is

<sup>1</sup> Dillon's Munic. Corp. §241.

Rep. 812; Carr v. State, 111 Ind. 101.

<sup>2</sup> People v. Whitlock, 92 N. Y. 191.

<sup>3</sup> People v. Weber, 86 Ill. 283; People v. Freese, 76 Cal. 633, 18 Pac.

<sup>4</sup> People v. Freese, 73 Cal. 633, 18 Pac. Rep. 812.

thus specified, it amounts to a prohibition to a removal for a different cause.<sup>1</sup> Where no particular cause is so specified, it must rest in the discretion of the executive, subject to the right of the courts to examine as to its existence,<sup>2</sup> to determine what cause shall be sufficient.<sup>3</sup>

The power of removal for cause is a special one, and it must be strictly pursued,<sup>4</sup> but the law will presume in this, as in other cases, that it has not been exercised unlawfully.<sup>5</sup>

§ 451. **Removals for political Reasons may be prohibited.**—It is also provided in many cases that the power of removal shall not be exercised for political reasons only.<sup>6</sup>

§ 452. **Power of Removal must be exercised within the Limits fixed.**—But the power of removal so conferred must be confined within the limits prescribed for it, and must be pursued with strictness. Hence it can be exercised only for the cause specified and in the manner and upon the conditions fixed.<sup>7</sup> And authority to remove for cause cannot be construed as an implied authority to remove at pleasure.<sup>8</sup>

§ 453. **Power to remove does not include Power to suspend.**—Although there is a conflict in the authorities, the better opin-

<sup>1</sup> *Commonwealth v. Shaver*, 3 Watts & S. (Penn.) 338; *Dubuc v. Voss*, 19 La. Ann. 210, 93 Am. Dec. 526; *Lowe v. Commonwealth*, 3 Metc. (Ky.) 287.

<sup>2</sup> See *post*, § 456.

<sup>3</sup> See *Patton v. Vaughan*, 39 Ark. 211; *State v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 181. Power to remove for causes named or for "other cause" means other *like* causes. *State v. McGarry*, 31 Wis. 496.

<sup>4</sup> *Commonwealth v. Slifer*, 25 Penn. St. 23, 64 Am. Dec. 680.

<sup>5</sup> *Dubuc v. Voss*, 19 La. Ann. 210, 93 Am. Dec. 526.

<sup>6</sup> See *State v. Board*, — N. J. —, 17 Atl. Rep. 113.

<sup>7</sup> Where the power of removal is conferred upon the board of one township, it cannot be exercised by the joint action of the boards of

two townships. *Crawford v. Township Board*, 24 Mich. 248.

Records of board's action must show all the facts necessary to give it authority to remove. *McGregor v. Supervisors*, 87 Mich. 388.

Where a two-thirds vote is essential to a removal, less than that will not avail. *People v. College*, 63 How. Pr. 220.

Removal can only be for causes prescribed. *Dubuc v. Voss*, 19 La. Ann. 210, 93 Am. Dec. 526.

Power of removal of officer for cause is a special authority, and must be strictly pursued. *Commonwealth v. Slifer*, 25 Penn. St. 23, 64 Am. Dec. 680.

<sup>8</sup> *Mead v. Treasurer*, 36 Mich. 416.

Under a constitutional provision that persons appointed to fill vacancies in office shall hold until the next

ion seems to be that the power to *remove* an officer does not include the power to *suspend* him temporarily from the office. A mere suspension would not create a vacancy, and the anomalous and unfortunate condition would exist of an office, an officer, but no vacancy, and of no one whose right and duty it was to execute the office.<sup>1</sup>

§ 454. **Necessity of Notice and Hearing before Removal.**—

In those cases in which the office is held at the pleasure of the appointing power, and where the power of removal is exercisable at its mere discretion, it is well settled that the officer may be removed without notice or hearing.<sup>2</sup>

But on the other hand, where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal can not, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense.<sup>3</sup>

general election, and the qualification of their successors, a board of supervisors may not remove at pleasure one whom they had appointed to fill a vacancy in the office of sheriff. *State v. Chathburn*, 63 Iowa 659, 50 Am. Rep. 760.

Where police commissioners are authorized to appoint a chief of police "for such time as the board shall determine," and appoint one without fixing the term, he holds for the statutory period, and the commissioners, having authority to remove for cause only, cannot remove him at pleasure. *State v. Commissioners*, 14 Mo. App. 297, 88 Mo. 144.

<sup>1</sup> *Gregory v. New York*, 118 N. Y. 416, 31 N. E. Rep. 119; *State v. Jersey City*, 1 Dutch. (N. J.) 536; *Con-*

*tra*, *Shannon v. Portsmouth*, 54 N. H. 188; *State v. Lingo*, 26 Mo. 496.

<sup>2</sup> *State v. St. Louis*, 90 Mo. 19; *Field v. Commonwealth*, 82 Penn. St. 478; *Ex parte Hennen*, 18 Pet. (U. S.) 280.

<sup>3</sup> *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128; *State v. St. Louis*, 90 Mo. 19; *Bagg's Case*, 11 Coke 99; *King v. Gaskin*, 8 T. R. 309; *Ramshay's Case*, 18 Ad. & El. (N. S.) 190; *Williams v. Bagot*, 3 B. & C. 786; *Queen v. Archbishop*, 1 Ell. & El. 545; *Page v. Hardin*, 8 B. Mon. (Ky.) 672; *Willard's Appeal* 4 R. I. 601; *Field v. Commonwealth*, 82 Penn. St. 478; *State v. Bryce*, 7 Ohio, pt. 2, 82; *Foster v. Kansas*, 112 U. S. 201; *Kennard v. Louisiana*, 92 U. S. 480.

It is, however, within the power of the legislature, where it has given the authority to appoint to an office created by it, to authorize the removal of the incumbent without notice or hearing, as when the executive is authorized to remove "for any cause deemed sufficient to himself."<sup>1</sup>

In one or two cases it has been held that where the governor may remove for cause, he is the sole judge of the existence of the cause: *State v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131; *Patton v. Vaughan*, 39 Ark. 211. but these cases have not been generally approved or followed.

<sup>1</sup>*People v. Whitlock*, 92 N. Y. 191. Here the mayor of a city was given authority to remove police commissioners "for any cause deemed sufficient to himself." Said DANFORTH, J.: "The next position of the relators raises a more interesting general question; whether they were entitled to have notice or be heard before the final action of the mayor. At common law there could be no doubt as to this. *Bagg's Case* (11 Coke 99). *King v. Caskin* (8 Term Rep. 209), and many others cited by the learned counsel for the appellants stand upon the principle that no one shall be condemned, unheard, but this, too, when applied to the term of office, is within the control of the legislature, and as it gave the power to appoint, it may also give the power to remove. (Const. Art. 10, § 3; *People ex rel. Sims v. Board of Fire Commissioners of the City of New York*, 73 N. Y. 437.) In the act before us (Laws of 1881, § 1, chap. 559) the power of removal has been expressly conferred upon the mayor, to be exercised as to him shall seem meet. In *People ex rel. The Mayor v. Nichols* (79 N. Y. 583) cited by the appellant, the statute required not only that the cause for removal should

exist, but also that the officer should have an opportunity to be heard. The statute before us lacks both conditions. No opportunity to be heard is given, and it is enough if the mayor thinks there is sufficient cause. It may or may not exist, except in his imagination, but his conclusion is final. The diligence of appellants' counsel has found no case like it, and those cited by him do not apply. They require either the actual existence of 'cause,' or 'sufficient cause,' for removal, and so by implication impose investigation before action, or by express language give a hearing to the accused member or official. Here the removal is to be determined summarily, and is intrusted to the unrestrained discretion of the mayor. Nor is this without a precedent. Among other cases, like power is given to the governor over the superintendent of public works, and to the latter over his assistant superintendents. (Const. of N. Y. art. 5, § 3), and to the board of commissioners of the fire department of New York, over certain subordinates. (Laws of 1873, chap. 335, § 28.) Under that statute it was held that the power of removal was to be exercised at pleasure, except in cases where there was an express limitation to a removal after notice and a hearing, and for cause. (*People ex rel. Sims v. Board of Fire Commr's, supra*)."

See to like effect, *Sweeney v. Stevens*, 46 N. J. L. 344.

§ 455. **Proceedings for Removal are judicial in their Nature.**—Proceedings for the removal of an officer for cause are judicial in their nature and must be had before tribunals clothed with judicial powers.<sup>1</sup> The fit and appropriate tribunal, therefore, in ordinary cases is the court of law,<sup>2</sup> but this judicial power may be, and often is, expressly conferred upon the governor, mayor or other officer or board having the power of removal.<sup>3</sup>

The proceeding being thus a judicial one, the power must be exercised under the same limitations, precautions and sanctions as in other judicial proceedings.<sup>4</sup>

§ 456. **Right of the Courts to review the Proceedings.**—It follows necessarily from the considerations noticed in the two preceding sections that the question of the regularity of the proceedings by which the removal is attempted must always be open to review in the courts.<sup>5</sup>

§ 457. **For what Conduct removed.**—Statutes authorizing the removal of public officers for cause usually declare what cause shall be deemed sufficient. This cause is often defined with much exactness, but more frequently general terms are used such as official misconduct, mal-administration in office, breach of good

<sup>1</sup> Dullam v. Willson, 53 Mich. 892, 51 Am. Rep. 128; State v. Pritchard, 36 N. J. L. 101; Page v. Hardin, 8 B. Mon. (Ky.) 672.

<sup>2</sup> Page v. Hardin, 8 B. Mon. (Ky.) 672.

<sup>3</sup> Thus in Michigan a provision in the constitution authorizing the governor to remove officers for causes specified was held to confer upon him the judicial power to hear and determine as to the existence of the cause. Dullam v. Willson, 53 Mich. 892, 51 Am. Rep. 128.

<sup>4</sup> Thus a proceeding before a township board for the removal of an officer of a school district is in the nature of a judicial proceeding, and when one of the board is interested in the subject of the complaint, and the presence of such member is essential

to the quorum, the proceeding is void because of the prohibition, common to all judicial tribunals, that no person can sit as a judge in any cause in which he is a party, or in which he is interested. Stockwell v. Township Board, 22 Mich. 341.

<sup>5</sup> Dullam v. Willson, 53 Mich. 892; 51 Am. Rep. 128; State v. St. Louis, 90 Mo. 19; Bagg's Case, 11 Coke 99; King v. Gaskin, 8 T. R. 209; Ramshay's Case, 18 Ad. & El. (N. S.) 190; Williams v. Bagot, 8 B. & C. 786; Queen v. Archbishop, 1 El. & El. 545; Page v. Hardin, 8 B. Mon. (Ky.) 672; Willard's Appeal 4 R. I. 601; Field v. Commonwealth, 83 Penn. St. 478; State v. Bryce, 7 Ohio. pt. 2, 82; Foster v. Kansas, 112 U. S. 201; Kennard v. Louisiana, 92 U. S. 480.

behavior, willful neglect of duty, extortion, habitual drunkenness, and the like.

Where no constitutional provision interferes, it must rest with the legislature to determine what causes shall be sufficient to warrant a removal,<sup>1</sup> but where the constitution provides that officers may be removed for a given cause, defining it in terms which have a definite and well understood legal meaning, it is not competent for the legislature to extend its scope by adding or incorporating offenses which do not fall within that meaning. The statement of one cause is an implied prohibition to the legislature's adding to it or extending it to other causes.<sup>2</sup>

Where the removal is to be for *official* misconduct or for misfeasance or mal-administration *in office*, the misconduct which shall warrant a removal of the officer must be such as affects his performance of his duties as an officer and not such only as affect his character as a private individual. In such cases, it is necessary "to separate the character of the man from the character of the officer."<sup>3</sup>

Misconduct,<sup>4</sup> willful mal-administration<sup>5</sup> or breach of good

<sup>1</sup> See *ante*, § 447.

<sup>2</sup> *Commonwealth v. Williams*, 79 Ky. 42, 43 Am. Rep. 204.

Intoxication is not "misfeasance in office," within the meaning of the constitution of Kentucky, and a statute pronouncing it misfeasance and providing for the removal of the officer therefor is unconstitutional. *Commonwealth v. Williams*, *supra*.

But under the Indiana constitution, providing for the removal of public officers for crime, incapacity or negligence, a statute providing for their removal for voluntary intoxication in business hours, or for habitual intoxication, is valid. *McComas v. Krug*, 81 Ind. 327, 43 Am. Rep. 185.

See also *State v. Gilmore*, 20 Kans. 551, 27 Am. Rep. 189.

<sup>3</sup> *Commonwealth v. Barry*, Hardin (Ky.) 229; *Commonwealth v. Chambers*, 1 J. J. Marsh. (Ky.) 160; *Commonwealth v. Williams*, *supra*.

<sup>4</sup> *State v. Leach*, 60 Me. 53, 11 Am. Rep. 172.

<sup>5</sup> *Minkler v. State*, 14 Neb. 181. In this case COBB, J., says: "Counsel draw a distinction between the legal meaning of the prefixes, *mal* and *mis*, and in effect claim that while the county surveyor was guilty of *mis*-administration, he was not guilty of *mal*-administration. But whatever there may be in the original meaning of the two words, we find them used in the law books almost or quite interchangeably, indicating a regard for euphony of sound rather than a distinction in meaning.

Thus in Bouvier's Law Dictionary, under the word mal-practice, in Latin *mala-praxis*, we find the several definitions of *willful mal-practice*, *negligent mal-practice*, and *ignorant mal-praxis*. Certainly the prefix *mal* is not used in the two last cases to signify intentional wrong.

In the case of *Colte v. Lynes*, 23

behavior,<sup>1</sup> in office, do not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or the official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive.<sup>2</sup>

An officer will not, ordinarily, be removed for the misconduct of his deputy, unless he has directed, ratified or participated in it.<sup>3</sup>

§ 458. **Same Subject—Illustrations.**—Illustrations of these rules are numerous and will show their application.

Thus repeated acts of removal of government section corner-stones by a county surveyor, although under a claim of right so to do for the purpose of rectifying the original government survey, amount to "willful mal-administration in office" justifying his removal;<sup>4</sup> the act of a county clerk in knowingly permitting official records to be materially altered,<sup>5</sup> or in falsely certifying to fictitious records,<sup>6</sup> is a "breach of good behavior," for which he may be removed, although he had no corrupt motive; the act of a register of deeds in falsely certifying over his official signature, that he had examined a title and found it unencumbered, is "misconduct in office," which will justify his removal.<sup>7</sup>

Conn. 100, the court use the following language: 'For a misfeasance strictly is a default in not doing a lawful act in a proper manner—omitting to do it as it should be done, while malfeasance is the doing of an act wholly wrongful and unlawful, and nonfeasance is an omission to perform a required duty at all, or total neglect of duty.'

The phrase mal-administration is not found in any of the law dictionaries, but we cannot be far wrong in giving it the signification of wrong administration, and we believe that to be the sense in which the legislature used it in framing the section under consideration. Certainly, the prefix *mal* could not have been therein used in the sense of corruption or oppression, as these are both

expressly provided for by other clauses of the same section.

The word *willful* or *willfully* is variously construed. Abbott, in his law dictionary, says that it is a term used in averring or describing an act, particularly one charged as a crime, to show that it was done with free activity of the perpetrator's will."

<sup>1</sup> Commonwealth v. Barry, Hardin (Ky.) 229; Commonwealth v. Chambers, 1 J. J. Marsh. (Ky.) 160.

<sup>2</sup> Minkler v. State, 14 Neb. 181.

<sup>3</sup> State v. Budd, 39 La. Ann. 232 (case of a sheriff).

<sup>4</sup> Minkler v. State, 14 Neb. 181.

<sup>5</sup> Commonwealth v. Barry, Hardin (Ky.) 229.

<sup>6</sup> Commonwealth v. Chambers, 1 J. J. Marsh. (Ky.) 160.

<sup>7</sup> State v. Leach, 60 Mo. 53, 11 Am. Rep. 172.



"When an officer acting in his official capacity," said the court in the last case, "and under his official signature does an act which has relation and refers to matters belonging to his department, and under his particular charge, and he acts knowingly, designedly, falsely, and the act is one calculated to mislead, and one that in its nature may be used for purposes of fraud or imposition, it is misconduct in office within the intent of this statute. And this, although no actual corruption by bribery or otherwise is proved."

So it is misconduct in office, authorizing their removal, for superintendents of the poor to draw orders on the county treasurer in favor of persons without whose knowledge they themselves draw the money and then compel the payees to take from themselves at exorbitant prices such goods as they see fit to give them; or to use their official power and the poor fund to coerce the recipients of their favor to vote under their dictation; or not to refund to the treasurer money which has been repaid to them by persons to whom they have afforded temporary relief.<sup>1</sup>

It is misconduct in office, for which he may be removed, for a county attorney to wilfully and persistently refuse to prosecute a certain class of cases, *e. g.*, violations of the liquor law, though he does so because he believes the sentiment of the community is opposed to the prosecution,<sup>2</sup> or for a county clerk to wilfully and persistently refuse to perform his duties as clerk of the board of county commissioners, though he expressly bases his refusal upon the ground that he believes that their contemplated action is illegal.<sup>3</sup>

So demanding and receiving illegal fees constitute "official misconduct" for which an officer may be removed;<sup>4</sup> but bribing a voter previous to the election is not misconduct in office,<sup>5</sup> though receiving bribes while in office is such.<sup>6</sup>

§ 459. What constitutes a Removal—Implied Removals.—A removal from office may be express or implied.<sup>7</sup> Where it is

<sup>1</sup> *Gager v. Supervisors*, 47 Mich. 167.

<sup>2</sup> *State v. Foster*, 32 Kans. 18, 112 U. S. 201.

<sup>3</sup> *State v. Allen*, 5 Kans. 218.

<sup>4</sup> *Brackenridge v. State*, — Tex. —, 11 S. W. Rep. 630.

<sup>5</sup> *Commonwealth v. Shaver*, 3 Watts & S. (Penn.) 338.

<sup>6</sup> *State v. Jersey City*, 1 Dutch. (N. J.) 536.

<sup>7</sup> *People v. Carrique*, 2 Hill (N. Y.) 98; *Bowerbank v. Morris*, J. B. Wal-

expressly made, no question can ordinarily arise either as to its purpose or effect. But in the case of an implied removal, more room for doubt may exist. The question most frequently arising in this connection is as to the effect of a second appointment where the incumbent under the first has not been expressly removed.

It has been held that, where an officer is appointed to hold during the pleasure of the appointing power, the appointment of another person operates as an implied removal of the first.<sup>1</sup>

"Whether this result could follow," said COOLEY, J., "where the term of office is fixed by law and is to continue for a definite period unless an actual removal takes place, would seem to have been doubted by the Supreme Court of New York,<sup>2</sup> but we do not feel called upon to decide the point in this case. A removal cannot be made without an intent to remove: and here it is clear that the council did not suppose they were exercising their power to remove, and they cannot therefore be held to have intended it." It was therefore held that the appointment of a second at a time when it was erroneously supposed the term of the first had expired, could not be deemed to be an implied removal of the first, even though the council had the power of removal at pleasure, there being no intent to remove, but only to fill a supposed vacancy.<sup>3</sup>

§ 460. **Same Subject—Notice of his Removal must be given to the Officer.**—"Where an office is held during the pleasure of the appointing power," says LEWIS, C. J., "a removal may be either express, that is, by a notification that the officer is removed; or implied, by the appointment of another person to the same office. But it has been decided that in either case the removal is not completely effected until notice actually received by the person removed. An office held during pleasure is not distinguishable from other cases of revocable authority. The officer has authority to act until notice of revocation."<sup>4</sup>

lace (U. S. C. C.) 119; Commonwealth v. Slifer, 25 Penn. St. 23, 64 Am. Dec. 680.

<sup>1</sup> People v. Carrique, 2 Hill (N. Y.) 93; Stadler v. Detroit, 18 Mich. 346; Commonwealth v. Slifer, 25 Penn. St. 23, 64 Am. Dec. 680.

<sup>2</sup> People v. Carrique, 2 Hill (N. Y.) 93. In such a case there is no implied removal. Commonwealth v. Slifer, 25 Penn. St. 23, 64 Am. Dec. 680.

<sup>3</sup> Stadler v. Detroit, 18 Mich. 346. See also People v. Lord, 9 Mich. 237.

<sup>4</sup> Commonwealth v. Slifer, 25 Penn.

## § 461. Removal not effected by revoking Appointment.—

When an officer is removable only for cause, and where he is not removable by the same power which appointed him, the appointing power can not effect his removal indirectly by rescinding or revoking his appointment after it is complete.<sup>1</sup> When the appointing power has once acted and the appointee has accepted the office and done what is required of him upon its acceptance, his title to the office becomes complete, and he can then be removed only in the regular way.<sup>2</sup>

§ 462. But Governor may revoke Commission issued by Mistake.—But where the governor has issued a commission to one person through mistake, supposing him to be duly elected, he may upon discovery of the error revoke the commission so issued, and reissue it to the person legally entitled to it.<sup>3</sup>

St. 23, 64 Am. Dec. 680, citing *Bowerbank v. Morris*, J. B. Wall. C. C. 124; *Crew v. Vernon*, Cro. Car. 97; *Atkyns v. Clare*, 1 Vent. 400; *Newland v. Shephard*, 2 P. Wms. 194, 19 Vin. Abr. 451, pl. 3; *Seint John's Case*, 5 Co. 71; *Boucher v. Wiseman*, Cro. Eliz. 440; *Fitz's Case*, *Id.* 12; *Ex parte Hennen*, 13 Pet. (U. S.) 260; *Smyth v. Latham*, 9 Bing. 692.

<sup>1</sup> *Attorney-general v. Love*, 10 Vroom (N. J.) 476, 23 Am. Rep. 234; *Ewing v. Thompson*, 48 Penn St. 372; *People v. Reid*, — Colo. —, 17 Pac. Rep. 302.

<sup>2</sup> *Marbury v. Madison*, 1 Cranch (U. S.) 137.

<sup>3</sup> *Gullick v. New*, 14 Ind. 93, 77 Am. Dec. 49; *State v. Capers*, 37 La. Ann. 747.

## CHAPTER VII.

## BY LEGISLATIVE ACTION.

§ 463. An Office is not a Contract.

464. An Office is not Property.

465. Statutory Offices may be altered or abolished by Legislature.

§ 466. Municipal Offices may be abolished.

467. Constitutional Offices cannot be impaired.

§ 463. An Office is not a Contract.—Except in North Carolina,<sup>1</sup> it is now well settled that there is no contract, either express or implied, between a public officer and the government whose agent he is. “The latter,” says a learned judge, “enters into no agreement that he shall receive any particular compensation for the time he shall hold office; nor, in the case of a statutory office, that the office itself shall continue any definite period. Where the constitution limits the compensation, it is beyond legislative control; but that makes no contract. The people have the control in their sovereign capacity, as the legislature has in statutory offices. \* \* \* On the part of the officer, there is still less in the nature of a contract. Whether he holds under a constitution or a statute, he is under no obligation to discharge his duties a single day. He may resign at any time and no power of the government can prevent him. The legislature may attach penalties to a refusal to serve in a public station, but that does not affect the question.”<sup>2</sup>

Legislative control over an office, then, is not prohibited by that provision of the Constitution of the United States forbidding the impairment of the obligation of contracts.<sup>3</sup>

§ 464. An Office is not Property.—Neither, except in North

<sup>1</sup> *Hoke v. Henderson*, 4 Dev. (N.C.) L. 1, 25 Am. Dec. 677.

<sup>2</sup> *Connor v. New York*, 2 Sandf. (N. Y.) 355, 5 N. Y. 285; *Commonwealth v. Bacon*, 6 Serg. & R. (Penn.) 322; *Commonwealth v. Mann*, 5

*Watts & S.* 418; *Butler v. Pennsylvania*, 10 How. (U. S.) 402; *Koontz v. Franklin County*, 76 Penn. St. 154.

<sup>3</sup> In *Connor v. New York*, *supra*.

<sup>4</sup> *Butler v. Pennsylvania*, 10 How. (U. S.) 402.

Carolina,<sup>1</sup> can a public office be regarded as the property of the incumbent.<sup>2</sup>

"Public offices," says RUGGLES, C. J., "are not incorporeal hereditaments, nor have they the character or qualities of grants. They are agencies. With few exceptions, they are voluntarily taken, and may, at any time, be resigned. They are created for the benefit of the public, and are not granted for the incumbent. Their terms are fixed with a view to public utility and convenience, and not for the purpose of granting the emoluments during that period to the office-holder."<sup>3</sup>

§ 465. **Statutory Offices may be altered or abolished by the Legislature.**—Where, then, an office is created by statute, it may, in the absence of constitutional prohibitions, be entirely abolished,<sup>4</sup> or its term may be increased or diminished,<sup>5</sup> or the manner of filling it may be changed,<sup>6</sup> or its compensation may be altered,<sup>7</sup> or its duties may be diminished or increased,<sup>8</sup> at the will of the legislature at any time, even though done during the term for which the then incumbent was elected or appointed.

So the legislature may declare the office vacant,<sup>9</sup> or may trans-

<sup>1</sup> King v. Hunter, 65 N. C. 603, 6 Am. Rep. 754; Brown v. Turner, 70 N. C. 93; Vann v. Pipkin, 77 N. C. 408.

<sup>2</sup> Connor v. New York, 5 N. Y. 285; State v. Douglass, 26 Wis. 428, 7 Am. Rep. 87; Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325; State v. Davis, 44 Mo. 129.

<sup>3</sup> In Connor v. New York, *supra*.

<sup>4</sup> State v. Douglass, 26 Wis. 428, 7 Am. Rep. 87; Wilcox v. Rodman, 46 Mo. 322; *In re* Bulger, 45 Cal. 553; Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325; Bryan v. Cattell, 15 Iowa 538.

<sup>5</sup> Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325; Butler v. Pennsylvania, 10 How. (U. S.) 402; Walker v. Peelle, 18 Ind. 264; Taft v. Adams, 3 Gray (Mass.) 126; People v. Haskell, 5 Cal. 357.

<sup>6</sup> Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325; State v. Davis, 44 Mo. 129.

<sup>7</sup> Commonwealth v. Bacon, 6 Serg. & R. (Penn.) 322; Commonwealth v. Mann, 5 Watts & S. (Penn.) 418; Butler v. Pennsylvania, 10 How. (U. S.) 402; Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325; Farwell v. Rockland, 62 Me. 298; Barker v. Pittsburgh, 4 Barr (Penn.) 51; Connor v. New York, 5 N. Y. 291; Taft v. Adams, 3 Gray (Mass.) 126; People v. Devlin, 33 N. Y. 269, 63 Am. Dec. 377; Warner v. People, 2 Denio (N. Y.) 272, 43 Am. Dec. 740.

<sup>8</sup> Bunting v. Gales, 77 N. C. 268; Hoke v. Henderson, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677; Attorney-General v. Squires, 14 Cal. 18; Bryan v. Cattell, 15 Iowa 538; Rhodes v. Hampton, 101 N. C. 629, 8 S. E. Rep. 219.

<sup>9</sup> People v. Van Gaskin, 5 Mont. 352; Denver v. Hobart, 10 Nev. 23; State v. Davis, 44 Mo. 129.

fer its duties to another officer,<sup>1</sup> although the effect may be to remove the officer in the middle of his term, or to abolish his office by leaving it devoid of duties.

§ 466. **Municipal Offices may be abolished.**—The same general principles apply to municipal offices. They may be abolished, altered, extended or vacated by the municipal authority which created them,<sup>2</sup> or by the legislature by which the corporation itself was created.<sup>3</sup>

So where the legislature has conferred upon a municipal board the authority to create offices, the board may abolish the offices so created, though the term of the incumbent has not expired.<sup>4</sup>

But where the statute provides for an office with a salary attached to be fixed by the board of supervisors, the latter can not virtually abolish the office by cutting down the salary to a nominal sum.<sup>5</sup>

§ 467. **Constitutional Offices can not be impaired.**—But where the tenure and term of office are fixed by the constitution different considerations apply. Such provisions as the constitution makes are beyond the power of the legislature to alter or destroy.<sup>6</sup>

Thus where a State constitution provides for the election of sheriffs and fixes the term of office, though it does not define what powers, rights and duties shall attach or belong to the office, the legislature has no power to take from a sheriff a part of the duties and functions usually appertaining to the office, and transfer it to an officer appointed in a different manner and holding the office by a different tenure.<sup>7</sup>

So where the constitution provides for the election of judges

<sup>1</sup> Attorney-General v. Squires, 14 Cal. 18.

<sup>2</sup> Augusta v. Sweeney, 44 Ga. 463, 9 Am. Rep. 172; Dillon's Munic. Corp. § 281.

<sup>3</sup> See People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; People v. Detroit, 28 Mich. 228, 15 Am. Rep. 202.

<sup>4</sup> Ford v. Commissioners, — Cal. —, 22 Pac. Rep. 278.

<sup>5</sup> De Soto County v. Westbrook, 64 Miss. 312.

<sup>6</sup> Commonwealth v. Gamble, 63 Penn. St. 343, 1 Am. Rep. 422; King v. Hunter, 65 N. C. 603, 6 Am. Rep. 754; State v. Brunst, 26 Wis. 428, 7 Am. Rep. 87; Foster v. Jones, 79 Va. 642, 52 Am. Rep. 637; State v. Ohoate, 11 Ohio 511; State v. Messmore, 14 Wis. 170; Howard v. State, 10 Ind. 99.

<sup>7</sup> State v. Brunst, 26 Wis. 428, 7 Am. Rep. 87; King v. Hunter, 65 N. C. 603, 6 Am. Rep. 754.

and fixes their jurisdiction and term of office, a judicial district created by an act of the legislature cannot, during the constitutional term of the judge elected therein, be abolished by a subsequent act which repeals the first and transfers the territory to another district.<sup>1</sup> But where a judge has been elected by the legislature, the legislature may lawfully reduce his district to the minimum extent as fixed by the constitution, though the effect be to decrease his compensation.<sup>2</sup>

<sup>1</sup> Commonwealth v. Gamble, 62 Ill. 547; State v. Messmore, 14 Wis. Penn. St. 348, 1 Am. Rep. 432; Commonwealth v. Mann, 5 Watts & S. 163.

<sup>2</sup> Foster v. Jones, 79 Va. 642, 33 (Penn.) 403; People v. Dubois, 28 Am. Rep. 637.

## CHAPTER VIII.

### BY IMPEACHMENT.

**§ 468. Purpose of this Chapter.**

**I. THE AUTHORITY TO IMPEACH.**

**469. Declared by the Constitution.**

**II. THE TRIBUNAL.**

**470. Impeachments originate in the House, but are tried by the Senate.**

**III. WHAT OFFICERS MAY BE IMPEACHED.**

**471. Usually Civil Officers only.**

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**§ 468. Purpose of this Chapter.**—The last method to be here considered by which the removal of a public officer may be effected is that of impeachment. Great difficulty is experienced in dealing with this subject, not only because it is a proceeding very rarely resorted to, but also because it proceeds before a special tribunal having peculiar powers and because much uncertainty and conflict of opinion exist in regard to its scope and application. A brief summary of its main features is, therefore, all that will be here attempted.

#### I.

##### THE AUTHORITY TO IMPEACH.

**§ 469. Declared by the Constitution.**—The authority to institute and carry on the extraordinary proceeding by impeachment is one conferred by the constitutions of the United States and of the States respectively. The constitution of the United States provides that "The president, vice-president, and all civil officers of the United States, shall be removed from office on



impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanors.”<sup>1</sup>

Provisions more or less similar to this are found in the constitutions of most of the States.<sup>2</sup>

## II.

### THE TRIBUNAL.

§ 470. **Impeachments originate in the House but are tried by the Senate.**—The Constitution of the United States provides that “The house of representatives shall \* \* \* have the sole power of impeachment,”<sup>3</sup> but “The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.”<sup>4</sup>

This subdivision of the powers and responsibilities of impeachment is followed usually by the States.<sup>5</sup>

## III.

### WHAT OFFICERS MAY BE IMPEACHED.

§ 471. **Usually civil Officers only.**—By the constitution of the United States, as has been seen, it is declared that the president, vice-president, “and all civil officers of the United States” shall be liable to impeachment. This language, says Mr. Pomeroy,<sup>6</sup> “plainly excludes all private persons, and all officers in the land and naval forces,” and Judge Story,<sup>7</sup> following Mr. Rawle,<sup>8</sup> says that “all officers of the United States who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the

<sup>1</sup> Art. II., Sec. 4.

<sup>2</sup> A summary of these will be found in Stimson's Am. Stat. L., § 260.

<sup>3</sup> Art. I., Sec. II., Subd. 5.

<sup>4</sup> Art. I., Sec. III., Subd. 6.

<sup>5</sup> See Stimson's Am. Stat. L. § 262.

<sup>6</sup> Pomeroy's Const. Law, § 716.

<sup>7</sup> Story on Const. § 792.

<sup>8</sup> Rawle on Const. Ch. 22, p. 212.

army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment." Whether this language includes senators and representatives themselves seems open to doubt.<sup>1</sup>

By the constitutions of the States the enumeration of the officers who may be impeached is usually made more specific.

#### IV.

##### FOR WHAT ACTS OFFICERS MAY BE IMPEACHED.

§ 472. *Conflict of Views upon this Question.*—Under the Constitution of the United States, an officer can be impeached only for "treason, bribery and other high crimes and misdemeanors." The question thereupon arises, what are "high crimes and misdemeanors" within the meaning of this provision.

It seems to be settled that there are no crimes against the United States except such as are expressly made so by act of Congress.<sup>2</sup> Acting upon this rule, it is maintained by a large class of constructionists that impeachment can be had only for acts which are indictable, and that unless the crime is specially named in the constitution, impeachments, like indictments, can only be instituted for crimes committed against the statutory law of the United States.<sup>3</sup>

But, on the other hand, a more liberal view is maintained with great plausibility and force. The supporters of this view maintain that impeachable crimes and misdemeanors can not be limited to those only which are expressly made so by statutory enactment, but that, to use the language of one writer, "an impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the constitution, of law, of an official oath, or of duty, by an act committed or omitted,

<sup>1</sup> See Story on Const. 798; Pomerooy's Const. Law, § 716. In the case of William Blount, a senator, it was held by the senate that senators are not "civil officers," within the meaning of the constitution. See also

State v. Gilmore, 20 Kans. 551, 27 Am. Rep. 189.

<sup>2</sup> Wharton Crim. Law, §§ 163-164.

<sup>3</sup> See an exhaustive article by Prof. Theo. W. Dwight supporting this view in 6 Am. L. Reg. (N. S.) 237.

or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose."<sup>1</sup> Whether the act in question is such an act is solely for the senate to determine.

## V.

### THE JUDGMENT THAT MAY BE RENDERED.

§ 473. **Removal from Office and Disqualification.**—"Judgment in cases of impeachment," declares the constitution of the United States, "shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."<sup>2</sup>

Provisions more or less similar are found in the constitutions of the States.

§ 474. **Whether Officer may be suspended during Proceedings.**—The constitutions of many of the States provide that all or certain officers shall be suspended from duty pending the impeachment proceedings. No such provision is found in the constitution of the United States. In the absence of such a provision, it is maintained that if the power exists at all it can be only in the case of subordinate ministerial officers.<sup>3</sup>

§ 475. **Impeachment does not prevent other Punishment.**—"Impeachments of public officers," says Chancellor SANDFORD, "a peculiar species of accusation, made and tried in a peculiar manner, are to extend no farther in their effect than to discharge an officer from his trust, and to render him incapable of holding office; but if the cause, for which the officer is thus punished, is a public offense, he may be also indicted, tried and punished, according to law; the constitution leaving the definition of the offense, and its particular punishment, in this case, as in all others,

<sup>1</sup> See an exhaustive article by Judge WM. LAWRENCE of Ohio, supporting this view, in 6 Am. L. Reg. (N. S.) 641. Prof. Pomeroy also supports this view. Pomeroy's Const. Law, § 725.

<sup>2</sup> Art. I. Sec. Subd. 7.

<sup>3</sup> Mr. Pomeroy is of the opinion that the power exists as to such officers. Const. Law, § 728. See also Prof. Dwight's article, 6 Am. L. Reg. (N. S.) at p. 276.

to the general power of the legislature. This part of the constitution, concerning judgment on impeachments, is therefore a limitation of the power of the court for the trial of impeachments, and not a restriction upon the general power of the legislature over crimes." <sup>1</sup>

So where the constitution provides for the impeachment or removal of public officers for crime, incapacity or negligence, a statute providing for their removal for voluntary intoxication in business hours, or for habitual intoxication, is valid.<sup>2</sup>

<sup>1</sup> In *Barker v. People*, 3 Cow. (N. Y.) 686, 15 Am. Dec. 823. 43 Am. Rep. 185. But see *Commonwealth v. Williams*, 79 Ky. 42, 43

<sup>2</sup> *McComas v. Krug*, 81 Ind. 327. Am. Rep. 204.

## CHAPTER IX.

## OF THE REMEDY BY QUO WARRANTO.

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| <p>§ 476. In general.</p> <p>477. Nature of the Remedy.</p> <p>478. In what Cases applied.</p> <p>479. Will not lie where Position is not a public Office.</p> <p>480. Same Subject—What are Offices within this Rule.</p> <p>481. Same Subject—What are not Offices.</p> <p>482. Possession and User of the Office must be shown.</p> <p>483. Is a civil Proceeding.</p> <p>484. Is a discretionary Remedy.</p> <p>485. Effect of Acquiescence.</p> <p>486. Will not lie where there is other plain and adequate Remedy.</p> | <p>§ 487. Is superseded by special statutory Remedy.</p> <p>488. Proceedings usually conducted in Name of the Public.</p> <p>489. Practice in instituting the Proceedings.</p> <p>490. Interest of Relator.</p> <p>491. The Requisites of the Information.</p> <p>492. The Defendant's Pleadings.</p> <p>493. The Replication.</p> <p>494. The Burden of Proof.</p> <p>495. Trial by Jury.</p> <p>496. The Judgment.</p> <p>497. Effect of the Judgment.</p> <p>498. Damages for Usurpation.</p> <p>499. Costs.</p> |
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§ 476. In general.—As has been frequently seen in earlier portions of this work, the remedy usually adopted for the purpose of trying the title to public office is that ordinarily spoken of as *quo warranto*. In some of the States special remedies have been provided for the purpose, but in the majority of them the proceeding by *quo warranto* is still retained, and seems to deserve separate consideration.

§ 477. Nature of the Remedy.—The ancient writ of *quo warranto* was a high prerogative writ, in the nature of a writ of right for the king, against one who usurped or claimed any office, franchise or liberty of the crown, to inquire by what authority he supported his claim, in order to determine the right.<sup>1</sup>

In modern times in England, and in the United States, the ancient writ has fallen entirely into disuse, and is superseded by

<sup>1</sup> High Ex. Leg. Rem. § 592.

the information in the nature of a *quo warranto*, which is a proceeding by information in the proper court to determine by what authority, *quo warranto*, he assumes to hold and exercise the office in question. The use of this remedy, and the practice and procedure in seeking and applying it, have been regulated by statute in many of the States and in some superseded altogether, but where still in use, its main features are still the same.<sup>1</sup>

§ 478. In what Cases applied.—The proceeding by *quo warranto* is the proper and appropriate remedy for trying and determining the title to a public office, and of ascertaining who is entitled to hold it; of obtaining the possession of an office to which one has been legally elected and has become duly qualified to hold, and also of removing an incumbent who has usurped it, or who claims it by an invalid election, or who illegally continues to hold it after the expiration of his term.<sup>2</sup> Both of these remedies may be sought by the same information.<sup>3</sup>

*Quo warranto* is also an appropriate remedy for testing the validity of a statute under which the respondent's office was created.<sup>4</sup>

For the purpose of ousting an actual incumbent and of

<sup>1</sup> Superseded by other remedies in New York. Form but not the substance changed in Dakota. Territory v. Hauxhurst, 8 Dak. 205; Lies in Kansas, notwithstanding statute. Tarbox v. Sughrue, 36 Kans. 225.

<sup>2</sup> Griebel v. State, 111 Ind. 369, 12 N. East. Rep. 700; Williams v. State, 69 Tex. 368, 6 S.W. Rep. 845; State v. Owens, 63 Tex. 261; Owens v. State, 64 Tex. 500; State v. Meehan, 45 N. J. L. 189; Territory v. Ashenfelter, — N. M. —, 12 Pac. Rep. 879; Davidson v. State, 20 Fla. 784; Osgood v. Jones, 60 N. H. 548; French v. Cowan, 79 Me. 426; Tarbox v. Sughrue, 36 Kans. 225; Neeland v. State, 39 Kans. 154; State v. Commissioners, 39 Kans. 85, 19 Pac. Rep. 2; Collins v. Huff, 63 Ga. 207; Hardin v.

Colquitt, 63 Ga. 589; People v. Waite, 70 Ill. 25; People v. Moore, 73 Ill. 132; People v. Callaghan, 83 Ill. 128; Stone v. Wetmore, 44 Ga. 495; People v. Sweeting, 2 Johns. (N. Y.) 184; State v. Schnierle, 5 Rich. (S. C.) 299; State v. Brown, 5 R. I. 1; Territory v. Hauxhurst, 8 Dak. 205; Hammer v. State, 44 N. J. L. 667; State v. Stein, 18 Neb. 529; Gass v. State, 34 Ind. 425; Farrington v. Turner, 53 Mich. 72, 51 Am. Rep. 88.

<sup>3</sup> Griebel v. State, 111 Ind. 369, 12 N. East. Rep. 700.

<sup>4</sup> People v. Riordan, — Mich. —, 41 N. W. Rep. 482; People v. Maynard, 15 Mich. 463; Attorney-General v. Holihan, 29 Mich. 116; Attorney-General v. Amos, 60 Mich. 373.

admitting another to the office, *quo warranto* is, as has been seen,<sup>1</sup> the remedy and not *mandamus*.<sup>2</sup>

<sup>1</sup> *Ante*, §§ 216-218.

<sup>2</sup> *Frey v. Michie*, 68 Mich. 323, 36 N. W. Rep. —, 12 West. Rep. 586.

*French v. Cowan*, 79 Me. 426. In this case FOSTER, J., says:

"The office to which the petitioner seeks to be restored is actually filled by another, claiming under a legal appointment, admitted and sworn and exercising the functions of the office under color of right. In such case, the appropriate remedy of the petitioner in the first instance, if entitled to any, is by *quo warranto*, and not by *mandamus* alone. In this case, the petitioner is virtually attempting to oust an actual incumbent, and to place himself in an office, the title to which is in controversy, and which cannot be tried in a proceeding of this kind. The general and well nigh universal rule is that *mandamus* is not an appropriate remedy to try the title to an office as against one actually in possession under color of law. The decided weight of authority, both in the English and American courts, is in support of this doctrine.

In Dane's Abridgement the rule is thus stated: 'But if the office be already full by the possession of an officer *de facto*, no writ will be granted to proceed to a new election, until the person in possession has been ousted on proceedings in *quo warranto*.'

Judge Dillon, in his work on municipal corporations, after stating the English rule as above given, and that the same is generally recognized to be the law in this country, says: 'We have before seen that it is the doctrine of the English law, quite generally adopted in this country, that

where a person is in the actual possession of an office under an election or a commission, and is thus exercising its duties under color of right, that the validity of his election or commission cannot, in general, be tried or tested on a *mandamus* to admit another, but only by an information in the nature of *quo warranto*.' §§ 674, 678, 679, 680, 716.

The same doctrine is more emphatically laid down in *High on Ex. Leg. Rem.* § 49, and he asserts that the rule is established by an overwhelming current of authority that *mandamus* will not lie to compel the admission of another claimant nor to determine the disputed question of title to an office, where it is already filled by an actual incumbent who is exercising the functions of the office *de facto* and under color of right. In such cases, the party complaining and desirous of an adjudication upon his alleged title and right of possession, must assert his rights by the only proper, efficacious and speedy remedy, and that is an information in the nature of a *quo warranto*.

A careful examination of the decisions both of the English and American courts will not fail to convince the most doubting mind that the general current of authority runs in the same direction, and that the exceptions to the rule are rare and not well founded. A few of the very many authorities bearing directly upon this rule are given,—enough when examined to authenticate the assertion that the rule is too well settled to be denied. *King v. The Mayor of Winchester*, 7 A. & E. (84 E. C. L. 81); *The Queen v. The Mayor of Derby*, 7 A. & E. (84 E. C. L. 135);

So a bill in equity will not lie at the suit of a private individual to restrain the exercise of official functions, but resort must be had to the remedy by *quo warranto*.<sup>1</sup>

King v. The Mayor of Oxford, 6 A. & E. 848 (38 E. C. L. 89); Frost v. The Mayor of Chester, 5 E. & B. 538 (85 E. C. L. 536). COLERIDGE, J.: 'A mandamus goes only on the supposition that there is no one in office, for the purpose of restoring a party to office or to cause an election to be held.' The King v. The Mayor of Colchester, 2 T. R. 259; The Queen v. Phippen, 7 A. & E. 966 (34 E. C. L. 263); People v. New York, 3 Johns. Cases 79; in this case the court held: 'Where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person, and it is there laid down that the proper remedy, in the first instance, is by information in the nature of a *quo warranto* by which the rights of the parties may be tried. People v. Stevens, 5 Hill (N.Y.) 629; People v. Lane, 55 N.Y. 219; *In re* Gardner, 68 N.Y. 467; Duane v. McDonald, 41 Conn. 517; Wood v. Fitzgerald, 8 Oregon 566; Underwood v. Wylie, 5 Ark. 248; Bonner v. The State, 7 Ga. 478; People v. Detroit, 18 Mich. 838; Brown v. Turner, 70 N. C. 95; Denver v. Hobart, 10 Nev. 28; Meredith v. Supervisors, 50 Cal. 483. 'Mandamus will not be issued to admit a person to an office while another is in under color of right,' State v. Auditors, 36 Mo. 70; 'Mandamus will not lie to turn out one officer and to admit another in his place,' People v. Matteson, 17 Ill. 167; People v. Head, 25

Ill. 325; Hill v. Goodwin, 56 N. H. 441; *Ex parte* Harris (Alabama) 14 Am. Law Reg. (N. S.) 646; McGee v. State, 1 West. Reporter, 467 (Indiana); Ellison v. Raleigh, 89 N. C. 125. 'By *quo warranto* the intruder is ejected. By mandamus the legal officer is put in his place.' Prince v. Skillin, 71 Maine, 366.

That there have been exceptions to the rule is true. But upon what principle the exceptions have been founded, where there has been an actual incumbent, exercising the functions of the office, and being in under color of right, the decisions themselves fail to afford any satisfactory answer. In Maryland and Virginia, the courts have held that in such cases mandamus would lie. Thus in Dew v. The Judges of the Sweet Springs Dist. Court, 3 Hen. & Munf. 1, it was held that mandamus was the best remedy. So in Harwood v. Marshall, 9 Md. 88, the court of appeals of Maryland, came to the conclusion that resort to *quo warranto* as preliminary to mandamus was not necessary on the grounds of delay growing out of the use of the process, citing in support of its decision the case of Strong, Pet. 20 Pick. 484, a case more generally referred to as an exception to the rule than any other authority. But an examination of that case shows the fact that it was mandamus to the board of examiners to issue a certificate of apparent election to the petitioner, although, as the court there say, he might then be

<sup>1</sup> Osgood v. Jones, 60 N. H. 543, Equity not the proper form to try

title to office: Hinckley v. Breen, 55 Conn. 119.



*Quo warranto* will also lie for the purpose of ousting an incumbent whose title to the office has been forfeited by misconduct or other cause.<sup>1</sup> And in such a case it is not necessary that the question of forfeiture should ever before have been presented to any court for judicial determination, but the court, having jurisdiction of the *quo warranto* proceeding, may determine the question of forfeiture for itself.<sup>2</sup> The question must, however, be judicially determined before he can be ousted. "And if the alleged ground for ousting the officer," says VALENTINE, J., "is that he has forfeited his office by reason of certain

obliged to resort to *quo warranto* to test the title to the office. A distinction is there made between the cases where applications had been made to be admitted to an office by proceedings on mandamus, and the case there decided, where the petitioner only sought for a *certificate* of his election, like the case of *Marbury v. Madison*, 1 Cranch 168-9, and *The King v. The Mayor of Oxford*, 6 A. & E. 349 (33 E. O. L. 89), where it was said that the certificate was only one step toward the completion of the title. The court also in *Strong's Case* admitted that the two processes might be necessary to enable the petitioner to get possession of the office,—the one establish the legality of his election, the other to set aside that of the incumbent, and that although they were independent of each other, they might have been applied for at the same time and proceeded *pari passu*. The court *arguendo* claimed that there are authorities in support of the doctrine that mandamus is the appropriate remedy where there is an actual incumbent acting *de facto*, but the decision of the court is not based upon that ground, and is not authority to the extent claimed in *Conklin v. Aldrich*, 98 Mass. 558, where it is referred to. The general tenor of the decisions from Massachusetts recog-

nize and adopt the rule rather than the exception to it. *Attorney-General v. Simonds*, 111 Mass. 256. It is a fundamental principle that mandamus can be used only to compel the respondent to perform some duty which he owes to the petitioner, and can be maintained only on the ground that the petitioner has a present, clear, legal right to the thing claimed, and that there is a corresponding duty on the part of the respondent to render it to him. If therefore, as in the case at bar, the two persons are claiming the title to office adversely to each other, the respondent being in possession and exercising the duties pertaining to that office *de facto* under color of right, mandamus will not lie to compel the admission of the petitioner, or to determine the disputed question of title."

<sup>1</sup> *Commonwealth v. Walter*, 88 Penn. St. 105, 24 Am. Rep. 154; *State v. Collier*, 72 Mo. 13, 37 Am. Rep. 417; *State v. Wilson*, 30 Kans. 661; *Dulam v. Willson*, 58 Mich. 393, 51 Am. Rep. 128.

<sup>2</sup> *Commonwealth v. Walter*, 88 Penn. St. 105, 24 Am. Rep. 154; *State v. Wilson*, 30 Kans. 661; *State v. Allen*, 5 Kans. 213; *State v. Graham*, 13 Kans. 186.

acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions of themselves work a forfeiture of the office. Mere misconduct, if it does not of itself work a forfeiture, is not sufficient.<sup>1</sup> The court has no power to create a forfeiture, and no power to declare a forfeiture where none already exists. The forfeiture must exist in fact before the action of *quo warranto* is commenced.”

§ 479. Will not lie where Position is not a public Office.—The State does not inquire by *quo warranto* into the title to a position which is not a legally authorized public office.<sup>2</sup> The right to a mere employment must be tested by other means.<sup>3</sup> What are public offices, and how they are distinguished from mere employments has been already considered in an earlier portion of this work,<sup>4</sup> and further illustrations will be given in the following section.

Courts are also averse to granting leave to file an information in *quo warranto*, where the office in dispute is a petty and insignificant one.<sup>5</sup> So “although the statute says the information may be filed against ‘any person’ usurping office in ‘any corporation’ created by authority of this state, yet there must be very many cases in which the court would be at liberty to refuse to listen to the controversy. When the proprietors of a country store, or the members of a village library association, or the participants in a district school debating society, or an association of musical amateurs, may incorporate themselves under our general laws, and establish various grades of offices for the purposes of their organization, it can scarcely be seriously urged,” says COOLEY, J., “that the supreme court can be required to settle all their contested elections and appointments in this proceeding. There are grades of positions denominated offices which do not

<sup>1</sup> *Citing Cleaver v. Commonwealth*, 34 Penn. St. 238; *Brady v. Howe*, 50 Miss. 624, 625; *Lord Bruce's Case*, 2 Strange, 819; *King v. Ponsonby*, 1 Ves. Jr. 1, 7; *People v. Whitcomb*, 5 Ill. 172, 176; *Hugh on Extraordinary Legal Remedies*, § 618.

<sup>2</sup> *Citing above authorities and State v. Hixon*, 27 Ark. 398, 403.

<sup>3</sup> *State v. North*, 42 Conn. 79; *State v. Dearborn*, 15 Mass. 125.

<sup>4</sup> *People v. DeMill*, 15 Mich. 164; *Elliason v. Coleman*, 86 N. C. 235; *People v. Hills*, 1 Lans. (N. Y.) 202; *Burr v. McDonald*, 3 Gratt. (Va.) 215; *Dean v. Healy*, 66 Ga. 503.

<sup>5</sup> *See ante*, § 2.

<sup>6</sup> *Anonymous*, 1 Barn. K. B. 279.

rise to the dignity of being entitled to the notice of the attorney-general by information."<sup>1</sup> And in a later case<sup>2</sup> the same judge says that "it is at least doubtful whether the proceeding by information is applicable to the case of any office not created by the State itself."

§ 480. **Same Subject—What are Offices within the Rule.**—Illustrations of what are, and what are not offices, have been already given, but a brief statement will here be made of some of the positions which have been deemed public offices for the purposes of *quo warranto* proceedings.

Thus the following officers have been subjected to inquiry :—governor,<sup>3</sup> lieutenant-governor,<sup>4</sup> except where the jurisdiction is solely in the general assembly,<sup>5</sup> sheriff,<sup>6</sup> deputy sheriff,<sup>7</sup> county clerk,<sup>8</sup> county treasurer,<sup>9</sup> judge of probate,<sup>10</sup> circuit judge,<sup>11</sup> presiding officers of legislature,<sup>12</sup> directors of asylums,<sup>13</sup> an officer in a railroad company who is appointed by the State,<sup>14</sup> tax collector,<sup>15</sup> commissioner of highways,<sup>16</sup> commissioners to locate a county seat, lay out state roads and the like,<sup>17</sup> assessors,<sup>18</sup> school district clerk,<sup>19</sup> mayor of city,<sup>20</sup> school director,<sup>21</sup> city marshal.<sup>22</sup>

So the title of military officers is also open to inquiry upon this proceeding.<sup>23</sup>

<sup>1</sup> *People v. DeMill*, 15 Mich. 164.

<sup>2</sup> *Throop v. Langdon*, 40 Mich. 678.

<sup>3</sup> *Attorney-General v. Barstow*, 4 Wis. 567.

<sup>4</sup> *State v. Gleason*, 12 Fla. 265.

<sup>5</sup> *Robertson v. State*, 109 Ind. 79.

<sup>6</sup> *People v. Mayworm*, 5 Mich. 146; *Commonwealth v. Walter*, 83 Penn. St. 105, 24 Am. Rep. 154; *People v. Cicott*, 16 Mich. 288, 97 Am. Dec. 141.

<sup>7</sup> *State v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921.

<sup>8</sup> *People v. Miles*, 2 Mich. 348.

<sup>9</sup> *Clark v. People*, 15 Ill. 217.

<sup>10</sup> *People v. Heaton*, 77 N. C. 18.

<sup>11</sup> *Commonwealth v. Gamble*, 62 Penn. St. 343, 1 Am. Rep. 422.

<sup>12</sup> *Clark v. Stanley*, 66 N. C. 59; *Howerton v. Tate*, 68 N. C. 547.

<sup>13</sup> *Nichols v. McKee*, 68 N. C. 429;

*Welker v. Bledsoe*, 68 N. C. 457; *State v. Harrison*, 118 Ind. 484, 8 Am. St. Rep. 668.

<sup>14</sup> *Howerton v. Tate*, 68 N. C. 547.

<sup>15</sup> *Patterson v. Hubbs*, 65 N. C. 119; *Hyde v. State*, 53 Miss. 665; *People v. Callaghan*, 88 Ill. 128.

<sup>16</sup> *People v. Hurlbut*, 24 Mich. 59, 9 Am. Rep. 103.

<sup>17</sup> *People v. Hurlbut*, *supra*.

<sup>18</sup> *State v. Hammer*, 42 N. J. L. 435.

<sup>19</sup> *State v. Jenkins*, 46 Wis. 616.

<sup>20</sup> *People v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 312; *Commonwealth v. Jones*, 12 Penn. St. 365.

<sup>21</sup> *State v. Boal*, 46 Mo. 528.

<sup>22</sup> *State v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253.

<sup>23</sup> *State v. Brown*, 5 R. I. 1; *Commonwealth v. Small*, 26 Penn. St. 81.

§ 481. **Same Subject—What are not Offices.**—But the following are not public officers within this rule:—chief engineer of a railroad,<sup>1</sup> or other officers of a corporation elected by the directors,<sup>2</sup> a clerk in a municipal office,<sup>3</sup> a college professor,<sup>4</sup> a pilot,<sup>5</sup> special commissioners, appraisers, referees and the like,<sup>6</sup> and many others mentioned in a preceding chapter.<sup>7</sup>

§ 482. **Possession and User of the Office must be shown.**—It is indispensable to the jurisdiction in *quo warranto* that the respondent should be shown to have been in the actual possession and user of the office. It is not enough that he should claim the office, but an actual user must be shown.<sup>8</sup>

"But that which constitutes a sufficient user," says Mr. STEPHEN, "depends upon the nature of the office or franchise claimed; thus, where it appeared in the case of a freeman or free burgess of a corporation, that he had been sworn in, though no act or claim be stated to have been done or made by the defendant, the information was granted; and though a mere claim to be sworn in is no usurpation, yet a swearing in, though defective in law, may be; and where a defendant has taken the oath in such a way as he thought to be sufficient at the time to make him a free burgess, it was considered to be an user."<sup>9</sup>

Hence it is held that the taking of the oath within the time prescribed by law is a sufficient user, though the respondent has not actually performed the duties of the office.<sup>10</sup>

So where a person, who has been duly elected to an office and has qualified and taken possession of it, commits such acts while in the office as to work a forfeiture of it, he may be proceeded against by *quo warranto*, even though at the time he has practically abandoned the office but without resigning his claim to it.<sup>11</sup>

§ 483. **Is a civil Proceeding.**—Though originally regarded as

<sup>1</sup> Eliason v. Coleman, 86 N. C. 235.

<sup>2</sup> People v. Hills, 1 Lans. (N. Y.) 202; Burr v. McDonald, 3 Gratt. (Va.) 215.

<sup>3</sup> Throop v. Langdon, 40 Mich. 673.

<sup>4</sup> Butler v. Board of Regents, 83 Wis. 124.

<sup>5</sup> Dean v. Healy, 66 Ga. 503.

<sup>6</sup> Matter of Hathaway, 71 N. Y. 288, 244.

<sup>7</sup> See ante, Book I. chap. II.

<sup>8</sup> King v. Whitwell, 5 T. R. 85.

<sup>9</sup> 3 Stephen's Nisi Prius, 2441.

<sup>10</sup> People v. Callaghan, 88 Ill. 128; King v. Tate, 4 East. 387; King v. Harwood, 2 East. 177.

<sup>11</sup> State v. Graham, 13 Kans. 136.

a criminal proceeding, the remedy by information has now come to be considered as a purely civil one, which, while partaking in some of its forms and incidents of the nature of criminal process, is yet a strictly civil proceeding, resorted to for the purpose of testing a civil right by trying the title to an office or franchise and ousting the wrongful possessor.<sup>1</sup>

§ 484. **Is a discretionary Remedy.**—The pursuit of the remedy by information in *quo warranto* is not ordinarily a matter of right but one resting in the sound discretion of the court, and in England since the statute of Anne<sup>2</sup> and in many of the United States<sup>3</sup> it can only be filed, on the relation of a private individual, by leave of the court first had and obtained. In some of the States, however, such leave is not required.<sup>4</sup> It may be

<sup>1</sup> High. Ex. Leg. Rem. § 603, citing *State v. Hardie*, 1 Ired. (N. C.) 42; *State Bank v. State*, 1 Blackf. (Ind.) 267; *State v. Ashley*, 1 Ark. 279; *Lindsey v. Attorney-General*, 33 Miss. 508; *State v. Lingo*, 26 Mo. 496; *State v. Stewart*, 32 Mo. 379; *State v. Lawrence*, 38 Mo. 535; *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265; *Commonwealth v. Birchett*, 2 Va. Cas. 51; *Attorney-General v. Barstow*, 4 Wis. 567; *Commonwealth v. Commissioners*, 1 S. & R. (Penn.) 382; *Commonwealth v. McCloskey*, 2 Rawle (Penn.) 381, opinion of GIBSON, C. J.; *State v. Price*, 50 Ala. 563; *State v. DeGress*, 58 Tex. 387. *Contra*, in Illinois; *Donnelly v. People*, 11 Ill. 552, 32 Am. Dec. 459; *People v. Railroad Co.* 18 Ill. 66; *Wight v. People*, 15 Ill. 417; *Hay v. People*, 59 Ill. 94.

See also *Osgood v. Jones*, 60 N. H. 543; *Ames v. Kansas*, 111 U. S. 449; *Foster v. Kansas*, 113 U. S. 201.

<sup>2</sup> *Rex v. Dawes*, 4 Burr. 2120; *Rex v. Martin*, 4 Burr. 2122; *King v. Hythe*, 5 A. & E. 882; *King v. Peacock*, 4 T. R. 684; *King v. Stacy*, 1 T. R. 1; *Rex v. Sargent*, 5 T. R. 467; *Rex v. Parry*, 6 A. & E. 810.

<sup>3</sup> *People v. Waite*, 70 Ill. 25; *People v. Moore*, 73 Ill. 132; *People v. Callaghan*, 83 Ill. 128; *People v. Railroad Co.* 88 Ill. 537; *Commonwealth v. Cluley*, 56 Penn. St. 270, 94 Am. Dec. 75; *Commonwealth v. Jones*, 12 Penn. St. 365; *State v. Tolan*, 33 N. J. L. 195; *Commonwealth v. Reigart*, 14 Serg. & R. (Penn.) 216; *Commonwealth v. Arrison*, 15 Serg. & R. 133; *People v. Sweeting*, 2 Johns. (N. Y.) 183; *State v. Schnierle*, 5 Rich. (S. C.) 299; *State v. Fisher*, 28 Vt. 714; *State v. Smith*, 48 Vt. 266; *People v. Keeling*, 4 Col. 129; *State v. Bridge Co.* 18 Ala. 678; *State v. Mead*, 56 Vt. 353.

<sup>4</sup> Informations in Michigan may be filed in the Supreme Court by the Attorney-General to test the title to public office, either upon his own relation or upon the relation of any private party, without applying for leave. How. Stat. § 8635. See *People v. Knight*, 13 Mich. 230.

Informations may be filed in the circuit courts by the prosecuting attorney on his own relation or that of any citizen of the county, without leave, or by any citizen of the county alone on obtaining special leave. How. Stat. § 8662, subsection 2. See

filed by the State, in its sovereign capacity, by its attorney-general, without leave.<sup>1</sup>

The remedy being thus usually a discretionary one, it is well settled that the court, upon application to it, will consider all of the circumstances of the case,<sup>2</sup> and leave to file the information will not be granted, although the defect in the defendant's title may be manifest, where it is evident that it will be of no avail, as where it is clear that the respondent will remain in office whatever may be the decision;<sup>3</sup> or where the proceeding could be of little practical benefit, as when the term of the disputed office will expire before the trial can be had,<sup>4</sup> or when the court is satisfied that, if re-instated, relator might legally and would be dismissed again immediately,<sup>5</sup> or when a new election is about to

Vrooman v. Michle, — Mich. —, 86 N. W. Rep. 749, 18 West. Rep. 159.

<sup>1</sup> Commonwealth v. Walter, 83 Penn. St. 105, 24 Am. Rep. 154; State v. Vail, 53 Mo. 97.

<sup>2</sup> State v. Tolan, 88 N. J. L. 195, where DEPUE, J. says: "In Rex v. Dawes and Rex v. Martin, 4 Burr. 2122, which are known as the Winchelsea Cases, Mr. Justice YATES says: 'In all questions of this kind, one great distinction is always to be attended to, that these are applications by common relators who have no inherent rights of prosecution, but by the statute of Queen Anne, are left to the discretion of the court, whether they shall be permitted to prosecute or not. In the exercise of this discretion the court is not merely to consider the validity or defect of the defendant's title, but the expediency of allowing or stopping the prosecution under all its circumstances.' In that case, Lord Mansfield, in the exercise of that discretionary power, viewed the facts of the case—*first*, in the light in which, the relators, informing the court of the defect of title, appear, from their

behavior and conduct, in relation to the subject-matter of their information previous to their making the application; *secondly*, in the light in which the application itself manifestly shows their motives, and the purpose which it is calculated to suit; and, *thirdly*, the consequences of granting the information; and the application for leave was denied, although it appeared clear that the title of both the defendants was invalid. King v. Parry, 6 A. & E. 810; Cole on Criminal Informations, 165; Grant on Corporations, 253; Willcock on Corporations, 476; State v. Utter, 2 Green, 84."

<sup>3</sup> State v. McCullough, — Nev. —, 18 Pac. Rep. 756.

<sup>4</sup> People v. Sweeting, 2 Johns. (N. Y.) 184; Commonwealth v. Reigart, 14 Serg. & R. (Penn.) 216; Proceedings may be dismissed where title has expired at time of trial. State v. Porter, 58 Iowa 19; State v. Jacobs, 17 Ohio 143; State v. Tudor, 5 Day (Conn.) 829, or nearly expired; State v. Ward, 17 Ohio St. 543.

<sup>5</sup> *Ex parte* Richards, 3 Q. B. Div. 368, 28 Eng. Rep. 322.

occur which will afford the parties full redress;<sup>1</sup> or where the results of granting the leave would be much more disastrous than if it were denied, as when the successful prosecution of the remedy would cause the suspension of all municipal government in a city for more than a year.<sup>2</sup> It must also appear that there is a reasonable probability of being able to sustain the proceedings.<sup>3</sup>

Where the court has granted a rule to show cause why the information should not be filed, its discretion is not exhausted, but upon the return to the rule the leave to file the information may be denied if it appears that the rule was improvidently granted.<sup>4</sup>

But where the court has once granted the leave to file the information, it is held that its discretion or power is at an end, and that the issues raised must then be tried and determined according to the strict rules of law and right as in other cases.<sup>5</sup>

The discretion to be exercised by the court is not, however, a purely arbitrary one, and while leave to file the information is not granted as a matter of course, it will not be arbitrarily refused, but the court will exercise a sound discretion, according to law.<sup>6</sup>

§ 485. *Effect of Acquiescence.*—Where the information is filed on the relation of a private individual, to oust the incumbent and install the relator, the court will take into consideration the conduct of the latter, and where he has himself concurred in the respondent's holding,<sup>7</sup> or where he has acquiesced in the very irregularities of which he complains,<sup>8</sup> or where he has delayed for an unreasonable time in presenting his claims,<sup>9</sup> the relief will not be granted him.

<sup>1</sup> *State v. Schnierle*, 5 Rich. (S. C.) 299; *Commonwealth v. Athearn*, 3 Mass. 285; *People v. Harshaw*, 60 Mich. 200.

<sup>2</sup> *State v. Tolan*, 33 N. J. L. 195.

<sup>3</sup> *People v. Callaghan*, 83 Ill. 128.

<sup>4</sup> *Commonwealth v. Cluley*, 56 Penn. St. 270, 94 Am. Dec. 75; *Gilroy v. Commonwealth*, 105 Penn. St. 484.

<sup>5</sup> *State v. Brown*, 5 R. I. 1. But see *Vrooman v. Michle*, 69 Mich. 42, 38 N. W. Rep. 749, 18 West. Rep. 159, where it is said "the court has dis-

cretion to proceed to judgment or not, according as the public interests do or do not require it, and will not do so where no good end will be subserved by it."

<sup>6</sup> *People v. Waite*, 70 Ill. 25.

<sup>7</sup> *Queen v. Greene*, 2 A. & E. (N. S.) 460.

<sup>8</sup> *Queen v. Lockhouse*, 14 L. T. R. (N. S.) 359; *Dorsey v. Ansley*, 72 Ga. 460; *State v. Tipton*, 109 Ind. 73.

<sup>9</sup> *Queen v. Anderson*, 2 A. & E. (N. S.) 740.

But where the proceeding is on behalf of the State, the lapse of time will not bar the action,<sup>1</sup> nor will it be defeated by the acquiescence of the relator.<sup>2</sup>

§ 486. Will not lie where there is other plain and adequate Remedy.—As a general rule, a court having the power to exercise jurisdiction in *quo warranto* proceedings will not exercise its jurisdiction where some other plain and adequate remedy exists.<sup>3</sup>

§ 487. Is superseded by special statutory Remedy.—So, as has been seen in an earlier section, where a special proceeding has been provided by law for the trial of contested claims to public office, such proceeding is usually held to supersede the remedy by *quo warranto*.<sup>4</sup>

§ 488. Proceedings usually conducted in Name of the Public.—While the proceedings in *quo warranto* are civil in their nature, they are so far criminal in their form that they are usually conducted in the name of the sovereign power, and, except where by statute private individuals are authorized to institute them, they are begun, carried on and controlled only by the public legal officer, as the attorney-general or prosecuting attorney.<sup>5</sup>

<sup>1</sup> Commonwealth v. Allen, 128 Mass. 306.

<sup>2</sup> State v. Sharp, 27 Minn. 88.

<sup>3</sup> State v. Wilson, 80 Kans. 661; State v. Marlow, 15 Ohio St. 114; State v. Taylor, 15 Ohio St. 187; State v. Hixon, 27 Ark. 398; Commonwealth v. Leech, 44 Penn. St. 832; People v. Turnpike Co. 2 Johns. (N. Y.) 190; Neely v. Wadkins, 1 Rich. (S. C.) L. 42; Lord Bruce's Case, 2 Strange 819; King v. Ponsonby, 1 Ves. Jr. 1, 7, 8; King v. Heaven, 2 Durn. & E. 772.

<sup>4</sup> See ante, § 215.

<sup>5</sup> Must be in name of Attorney-General in New Hampshire, Osgood v. Jones, 60 N. H. 543, and in Illinois, People v. Railroad Co. 88 Ill. 587; attorney-general or prosecuting attorney may bring in Ohio, Res. Stats. § 6768; State v. Anderson, 45 Ohio St.

196, 12 N. E. Rep. 656; must be by attorney-general, in supreme court, in Michigan, Babcock v. Hanselman, 56 Mich. 27; Vrooman v. Michie, 69 Mich. 42, 36 N. W. Rep. 749, 13 West. Rep. 159. See also State v. Schnierle, 5 Rich. (S. C.) 299; Lindsey v. Attorney-general, 83 Miss. 506; State v. Stein, 13 Neb. 529; Robinson v. Jones, 14 Fla. 256; State v. Gleason, 12 Fla. 190; Barnum v. Gilman, 27 Minn. 466; Saunders v. Gatling, 81 N. C. 298; Bartlett v. State, 18 Kans. 99; Harrison v. Greaves, 59 Miss. 453.

"In this country the proceeding is conducted in the name of the State or of the people, according to the local form of indictments, and a departure from this form is a substantial and fatal defect." SWAYNE, J. in Territory v. Lockwood, 8 Wall. (U. S.) 236, citing Wright v. Allen, 2 Tex.



In certain cases the name of the attorney-general is used in proceedings virtually controlled by private parties, and by statute in some States the proceedings may be prosecuted entirely without his intervention.<sup>1</sup>

Where the office is one held under the government of the United States, proceedings in *quo warranto* must be prosecuted in the name of the United States and not in that of the State<sup>2</sup> or Territory<sup>3</sup> in which he exercises his functions.

§ 489. *Practice in instituting the Proceedings.*—The practice usually pursued in instituting proceedings in *quo warranto* is for the attorney-general to present to the court a petition or motion, based upon affidavits, for leave to file the information. A rule *nisi* is then made requiring the defendant to show cause why the information should not be filed against him. The defendant shows cause by affidavits, when, if sufficient, the proceedings will be discontinued, but if not, the rule for the information is made absolute.<sup>4</sup>

Upon leave being granted, the information is filed, and a summons issues to the defendant requiring him to appear and answer to the information; the order to show cause, or the defendant's appearance for that purpose, not being sufficient to give the court jurisdiction for the trial of the information<sup>5</sup> unless the formal process be waived.<sup>6</sup>

The practice of proceeding by the rule *nisi* is by no means uniform; and in some States the practice is to ask for leave in

158; *Wight v. People*, 15 Ill. 417; *Donnelly v. People*, 11 Ill. 552, 52 Am. Dec. 459; *Eaton v. State*, 7 Blackf. (Ind.) 65; *Commonwealth v. Lex. & H. T. Co.* 6 B. Mon. (Ky.) 398.

See also *Wallace v. Anderson*, 5 Wheat. (U. S.) 291.

<sup>2</sup> See *State v. Thompson*, 84 Ohio St. 365.

<sup>3</sup> *State v. Bowen*, 8 S. C. 400, a presidential elector.

<sup>4</sup> *Territory v. Lockwood*, 3 Wall. (U. S.) 236, a territorial judge.

<sup>5</sup> *People v. Waite*, 70 Ill. 25; *Commonwealth v. Jones*, 12 Penn. St. 356; *United States v. Lockwood*, 1 Pinn. (Wis.) 339; *People v. Tibbitts*, 4 Cow. (N. Y.) 388; *People v. Richardson*, 4 Cow. 103 and notes.

<sup>6</sup> *People v. Richardson*, 4 Cow. (N. Y.) 103; *Commonwealth v. Sprenger*, 5 Binn. (Penn.) 353; *Rex v. Trinity House*, Sid. 86; *Attorney-General v. Railroad Co.* 38 N. J. L. 282.

<sup>7</sup> *In re County Judge*, 33 Gratt. (Va.) 448; *Hambleton v. People*, 44 Ill. 458.

the first instance without the rule,<sup>1</sup> and, of course, where no leave is required, the information is filed at once.<sup>2</sup>

§ 490. *Interest of Relator.*—The State has always a sufficient interest to entitle it to call upon any one assuming to exercise the functions of a public office to show his title thereto,<sup>3</sup> and when the information is filed in its name by the attorney-general it will be presumed that he does so in his official capacity<sup>4</sup> and for the purpose of vindicating the rights of the State.<sup>5</sup>

But when the proceedings are instituted at the instance of a private individual, it must appear that he has some interest in the question,<sup>6</sup> for, as has been said, it would be a grievous rule which should compel a public officer to be called upon at any time to defend his title at the suit of every officious intermeddler.<sup>7</sup>

The interest of a citizen as a tax payer is sufficient to authorize him to institute an inquiry into the title of one who assumes to exercise the functions of a municipal officer.<sup>8</sup> All that the court requires in such cases, it is said, is to be satisfied that the relator is of sufficient responsibility, is acting in good faith and not vexatiously, and has not become disqualified by his own conduct with respect to the election or appointment he seeks to impeach.<sup>9</sup>

But where the proceeding is instituted by a private relator not only for the purpose of ousting the incumbent but also for

<sup>1</sup> Rule *nisi* is no longer required in Pennsylvania, where proceedings are by Attorney-General, *Gilroy v. Commonwealth*, 105 Penn. St. 484, nor in New Jersey, *Attorney-General v. Railroad Co.* 88 N. J. L. 282.

<sup>2</sup> As in Michigan, see *ante*, § 484, note 4. See also *Taggart v. James*, — Mich. —, 41 N. W. Rep. 262.

<sup>3</sup> *State v. Dahl*, 65 Wis. 510, 27 N. W. Rep. 843.

<sup>4</sup> *Commonwealth v. Fowler*, 10 Mass. 290.

<sup>5</sup> *Commonwealth v. Walter*, 88 Penn. St. 105, 24 Am. Rep. 154.

<sup>6</sup> *State v. Vail*, 58 Mo. 97, 109.

<sup>7</sup> *Commonwealth v. Meeser*, 44 Penn. St. 341.

<sup>8</sup> *State v. Hammer*, 42 N. J. L. 435; *State v. Martin*, 46 Conn. 479; *Com-*

*monwealth v. Commissioners*, 1 S. & R. (Penn.) 380. But *contra*, see *Miller v. Palermo*, 12 Kans. 14.

In *Churchill v. Walker*, 68 Ga. 681, it is held that every citizen of a town has such an interest in its municipal offices as will enable him to support a *quo warranto* proceeding to test the right of incumbents thereto. *JACKSON, C. J.*, concurred *dubitante*.

In *Commonwealth v. Meeser*, 44 Penn. St. 341, it is held, though with much doubt, that the proceeding could be instituted by a private citizen who appeared to be acting in good faith and to represent a large and responsible number of other citizens.

<sup>9</sup> In *State v. Hammer*, *supra*.

the purpose of installing himself in the office, he must show not only the defects in the defendant's title but also that he was himself eligible,<sup>1</sup> that he has the legal title to the office<sup>2</sup> and that he has done nothing to acquiesce in the condition of which he complains.<sup>3</sup> Where both he and the respondent claim title through the same election, the relator cannot defeat the respondent's title by showing the invalidity of the election, because he thereby shows the frailty of his own title as well.<sup>4</sup>

§ 491. *The Requisites of the Information.*—Something of diversity of opinion exists as to the requisites of the information in *quo warranto* cases. While the proceedings are civil in their nature, they are usually criminal in their form, and the information in ordinary cases conforms more largely to the forms used in criminal proceedings, though the modern tendency is to assimilate it to the forms of civil proceedings.<sup>5</sup>

Originally and primarily a proceeding upon the part of the sovereign to oust and punish usurpers and not to induct the legally entitled officer, the remedy has been gradually extended by statutes until it has become, in many of the States at least, practically a statutory remedy by which one person claiming to be entitled to a public office seeks to oust the possessor and to install himself.<sup>6</sup> This fact explains much of the diversity in the rulings in the different States and between the earlier and the later cases.

Where the proceeding is instituted by and on behalf of the State in its sovereign capacity to test the title of an alleged usurper, much more of generality of allegation is tolerated than in cases where a private individual is the prosecuting party. The title to all offices being derived from the State, and it having an inherent right at any time to call upon one who assumes

<sup>1</sup> *State v. Long*, 91 Ind. 351; *State v. Bieler*, 87 Ind. 320.

<sup>2</sup> *State v. Stein*, 13 Neb. 529; *State v. Boal*, 46 Mo. 528; *Miller v. Palermo*, 12 Kans. 14; *People v. Ryder*, 12 N.Y. 433; *State v. Tipton*, 109 Ind. 78; *Collins v. Huff*, 63 Ga. 207; *Hardin v. Colquitt*, 63 Ga. 587.

<sup>3</sup> *State v. Tipton*, 109 Ind. 78.

<sup>4</sup> *Collins v. Huff*, 63 Ga. 207; *Hardin v. Colquitt*, 63 Ga. 589.

<sup>5</sup> *People v. Clark*, 4 Cow. (N. Y.) 95; *State v. Commercial Bank*, 10 Ohio 535; *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

<sup>6</sup> It is impracticable to set out here the statutes of the several states upon this subject. The practitioner in each state will of course consult his own.

to exercise the functions of a public office, to show his right to do so,<sup>1</sup> it is evident that no specific allegations of right or title on the part of the State can be necessary. It is often said, therefore, in such cases, that the State is under no obligation to show any thing on its part,<sup>2</sup> and that a charge in general language that the respondent has intruded into, usurped and unlawfully exercised the functions of a certain office is all that is required to put him to his answer.<sup>3</sup> The existence of the office and its description must be made to appear with reasonable certainty.<sup>4</sup> The State is not bound to allege or show that it has made a demand for the office.<sup>5</sup> In all these cases, the State seeks to recover, not so much upon the strength of its own title as upon the weakness or defects in the respondent's title, which it calls upon him to establish. Defective allegations in the information should be taken advantage of by special demurrer.<sup>6</sup> The information may be amended and merely formal defects will be ignored.<sup>7</sup>

But where, on the other hand, the proceedings are instituted by or on behalf of a private relator, and are designed not only to oust the respondent but also to install the relator as the person legally entitled to the office, different considerations obviously apply. In these cases, which are largely the creatures of statute, it is usually held that the information must state clearly and

<sup>1</sup> "The State has always a right to demand of any one assuming a public office or franchise to show his authority." COOLEY, J., in *People v. DeMill*, 15 Mich. 164, 181. See to like effect: *People v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 312; *State v. Gleason*, 12 Fla. 265.

<sup>2</sup> "The people are not required to show anything." BREKKE, J., in *People v. Ridgley*, 21 Ill. 67. "The state is bound to make no showing." CAMPBELL, J., in *People v. Mayworm*, 5 Mich. 146, 148.

<sup>3</sup> *State v. Dahl*, 65 Wis. 510, 518, citing *State v. Messmore*, 14 Wis. 115, 116; *People v. Pease*, 30 Barb. (N. Y.) 538; *State v. Goetze*, 23 Wis. 363; *State v. Tierney*, 23 Wis. 430; *State v. Hoelfinger*, 35 Wis. 393; *State v.*

*Pierce*, 35 Wis. 93; *State v. Purdy*, 86 Wis. 213;

See also *People v. Woodbury*, 14 Cal. 43; *People v. Abbott*, 16 Cal. 358; *People v. Miles*, 2 Mich. 348; *People v. Ridgley*, 21 Ill. 67; *Clark v. People*, 15 Ill. 217.

<sup>4</sup> *People v. DeMill*, 15 Mich. 164; *People v. Ridgley*, 21 Ill. 67.

<sup>5</sup> *State v. McDiarmid*, 27 Ark. 176.

<sup>6</sup> *State v. Boal*, 46 Mo. 528; *Territory v. Lockwood*, 3 Wall. (U. S.) 236; *Regina v. Smith*, 2 M. & Rob. 109; *Regina v. Law*, 2 M. & Rob. 197; *People v. Palmer*, 14 Cal. 43; *Commonwealth v. Commercial Bank*, 22 Penn. Stat. 383.

<sup>7</sup> *Commonwealth v. Commercial Bank*, 28 Penn. St. 383; *People v. Richardson*, 4 Cow. (N. Y.) 109 note.

specifically the facts which show that the relator is entitled to the office; it must, therefore, show that he was eligible,<sup>1</sup> that he possessed all the qualifications required by law,<sup>2</sup> and that he was duly elected to the office.<sup>3</sup> Defects in this respect render the information obnoxious to a demurrer.<sup>4</sup>

The essentials of an information, in these cases now under consideration, are said to be "that it contain such a plain statement of the facts which constitute the grounds of the relator's claim as makes it affirmatively appear that he has title to the office in controversy, so as to 'show his interest in the matter.'"<sup>5</sup>

§ 492. **The Defendant's Pleadings.**—The defendant, by his plea, must either deny that he has or claims any title to the office in question, or he must show that his title to it is perfect. In other words he must either disclaim or justify. He cannot plead either not guilty or *non usurpavit*.<sup>6</sup>

If he seeks to justify, he must do so fully and specifically. It is not enough for him to allege generally that he was duly elected or appointed, but he must show, upon the face of his plea, such facts as, if true, will vest in him the legal title to the office.<sup>7</sup>

<sup>1</sup> State v. Stein, 13 Neb. 529; State v. Boal, 46 Mo. 528; Miller v. Palermo, 12 Kans. 14; People v. Ryder, 12 N. Y. 438.

<sup>2</sup> State v. Long, 91 Ind. 351; State v. Bieler, 87 Ind. 320; Reynolds v. State, 61 Ind. 393.

<sup>3</sup> State v. Boal, 46 Mo. 528.

<sup>4</sup> State v. Boal, 46 Mo. 528.

<sup>5</sup> Jones v. State, 112 Ind. 194, 11 West. Rep. 243.

<sup>6</sup> State v. Utter, 14 N. J. L. 84; State v. Barron, 57 N. H. 498; Illinois, &c., Ry. Co. v. People, 84 Ill. 426; Clark v. People, 15 Ill. 217; State v. Gleason, 12 Fla. 266; People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312; State v. Ashley, 1 Ark. 518; State v. Harris, 3 Ark. 570, 36 Am. Dec. 467; People v. Utica Ins. Co. 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

<sup>7</sup> State v. Harris, 3 Ark. 570, 36

Am. Dec. 467; Clark v. People, 15 Ill. 217; State v. Jones, 16 Fla. 306; People v. Richardson, 3 Cow. (N. Y.) 113, note.

In pleading an election to the office of director, by the stockholders of a corporation, defendant must show that the election was held agreeably to law, and in conformity with and in pursuance of the ordinances and regulations of the governing board of the corporation, and that at such election he received a majority of the legal votes; if his claim is by virtue of an election by the board of directors, to supply a vacancy therein, he must show the existence of a board competent to elect, and that a vacancy existed therein and how such vacancy arose, and his subsequent election to fill it. But his pleadings need only show a *prima facie* legal right to the office; if his

And not only must he show that he possessed the necessary qualifications at the time of his election or appointment, but it is held that he must go further and show the continued existence of every qualification necessary to the enjoyment of the office. The law makes no presumption of their continuance.<sup>1</sup>

It is no defense to him, when questioned by the State, to show that the relator is not entitled to the office. He is called upon to make good his own title, and if he can not do that, it is of no avail to him that the relator's title is equally defective.<sup>2</sup>

Where, however, the proceeding is instituted, under a statute, by a private relator who claims the office, and who, as has been seen,<sup>3</sup> must show his own title thereto, the rule is different. "No private citizen," says CAMPBELL, J., "has any right to compel an officer to show title, until he has shown his own right, in the first place, to attack it. In such a controversy, it is manifest that a plea showing that relator has no rights is as appropriate as one setting up title in the respondent. Either, if established, is a complete defence."<sup>4</sup>

The defendant may interpose as many defences as he has,<sup>5</sup> he may justify in part and disclaim in part.<sup>6</sup>

The plea need not be verified unless required by statute.<sup>7</sup>

pleadings show an election by electors acting under color of legal right, it is sufficient, and if the electors were not possessed of the proper qualifications, this must be shown by this state; *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460.

Defendant's pleadings are insufficient if they do not show that he qualified under the appointment by which he claims; *State v. McCann*, 88 Mo. 886.

In showing title to an elective office, a plea is sufficient which shows the authority for holding the election, the fact that it was held, and that the respondent received the largest or the requisite number of votes. It is not necessary to allege that the canvassers strictly performed their duty in all respects. *People v. VanCleve*, 1 Mich. 363. Neither is it ne-

cessary that respondent should allege his citizenship or other qualifications for the office. The fact of his election is enough to call upon the prosecution to show its invalidity by facts in reply. *Attorney-General v. McIvor*, 59 Mich. 516.

<sup>1</sup> *People v. Mayworm*, 5 Mich. 146; citing *State v. Beecher*, 15 Ohio 728; *People v. Phillips*, 1 Denio (N. Y.) 388; *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460; *State v. Ashley*, 1 Ark. 518.

<sup>2</sup> *Clark v. People*, 15 Ill. 217.

<sup>3</sup> See *ante*, § 490.

<sup>4</sup> *Vrooman v. Michie*, 69 Mich. 42, 86 N. W. Rep. 749, 13 West. Rep. 159.

<sup>5</sup> *People v. Stratton*, 25 Cal. 242.

<sup>6</sup> *People v. Richardson*, 4 Cow. (N. Y.) 118 note.

<sup>7</sup> *Attorney-General v. McIvor*, 59 Mich. 516.

§ 493. **The Replication.**—The plea of the respondent having been put in, the State may then reply. This replication sets forth the particular acts, omissions or defects upon which the State relies to controvert or defeat the claims of title made by the respondent.<sup>1</sup>

§ 494. **The Burden of Proof.**—1. When the respondent is called upon at the suit of the State to show by what warrant he assumes to exercise the functions of a public office, the burden of proving his title rests upon the respondent. As has been seen,<sup>2</sup> the State on its part is not required in the first instance to show anything, and the respondent must either disclaim or justify. The burden of proof is, therefore, upon him.<sup>3</sup>

When, however, the respondent has made out a *prima facie* right to the office, as by showing that he was declared duly elected by the proper officers or has received a certificate of election or holds the commission of appointment by the executive to the office in question, the burden of proof shifts. The certificate or returns of the election officers, as has been seen,<sup>4</sup> are *prima facie* evidence of the title, but they are not conclusive, and while they may not be impeached in a collateral inquiry, yet in a direct proceeding, like *quo warranto*, to determine the title, it is entirely competent to go behind the returns and ascertain the true condition of affairs.<sup>5</sup> The burden of impeaching the returns must rest upon the State.<sup>6</sup> But when this has been done and the returns are rejected, then the respondent is bound to establish his title by other proof, and if he fails to do so, the State is entitled to a judgment against him.<sup>7</sup>

<sup>1</sup> Commonwealth v. Commercial Bank, 28 Penn. St. 883; State v. Commercial Bank, 10 Ohio 535; Attorney-General v. Petersburg R. R. Co. 6 Ired. (N. C.) 456.

<sup>2</sup> See ante, § 491.

<sup>3</sup> People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People v. Utica Ins. Co. 15 Johns. (N. Y.) 353, 8 Am. Dec. 243; People v. Thompson, 31 Wend. (N. Y.) 253; People v. Pease, 27 N. Y. 63, 84 Am. Dec. 242; State v. McCann, 88 Mo. 386.

<sup>4</sup> See ante, § 212.

<sup>5</sup> People v. Pease, 27 N. Y. 63, 84 Am. Dec. 242; People v. Seaman, 5 Denio (N. Y.) 409; People v. Ferguson, 8 Cow. (N. Y.) 102; People v. Van Slyck, 4 Cow. (N. Y.) 297; People v. Vall, 20 Wend. (N. Y.) 12; Attorney-General v. Megin, 63 N. H. 379.

<sup>6</sup> People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

<sup>7</sup> People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

2. When the proceeding is instituted in behalf of a private individual, and has for its object not only to oust the respondent but to install the relator, the burden of proving the relator's title rests upon himself. Even though the respondent's title may be impeached, this does not establish the relator's right,<sup>1</sup> but before there can be a judgment in his favor he must show that he is legally entitled to receive the office upon the respondent's ouster.<sup>2</sup>

§ 495. Trial by Jury.—Trial by jury is not a matter of right in *quo warranto* cases,<sup>3</sup> but is provided for by the statutes of many of the States.<sup>4</sup>

§ 496. The Judgment.—Where the defendant disclaims, the State is entitled to an immediate judgment of ouster. If the issues were found in favor of the respondent, the judgment, at common law, was that he be allowed his office.<sup>5</sup>

Where, however, the defendant made default<sup>6</sup> or the issues were decided against him, the judgment, at common law, was that the defendant be fined for his usurpation and be ousted from his office.<sup>7</sup>

Under the modern statutes where the proceedings are instituted by the State, or by a private individual, not only to oust the respondent but also to install the relator, the judgment is ordinarily more comprehensive. In such a case the respondent may be ousted without the relator's being installed,<sup>8</sup> but ordina-

<sup>1</sup> *People v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 812.

<sup>2</sup> *People v. Lacoste*, 37 N. Y. 192; *Miller v. English*, 21 N. J. L. 817; *State v. Norton*, 46 Wis. 332; *State v. Hunton*, 28 Vt. 594.

<sup>3</sup> See *State v. Johnson*, 26 Ark. 281; *State v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253; *State v. Vail*, 53 Mo. 97; *State v. Johnson*, 26 Ark. 281.

But see *White v. Doesburg*, 16 Mich. 188; *State v. Allen*, 5 Kans. 218; *State v. Burnett*, 2 Ala. 140.

<sup>4</sup> In New York, see *People v. Albany, &c.*, R. R. Co. 57 N. Y. 161. In Minnesota, see *State v. Minnesota*

*Thresher Mfg. Co.* — Minn. —, 41 N. W. Rep. 1020.

<sup>5</sup> High, Ex. Rem. 745.

<sup>6</sup> In Michigan it was held that on the default of the respondent the court could give judgment of ouster, but could not determine the right of the relator to the office. *People v. Connor*, 13 Mich. 238. But see *Attorney-General v. Barstow*, 4 Wis. 567.

<sup>7</sup> High, Ex. Rem. §§ 745, 747.

<sup>8</sup> The judgment of ouster against the respondent does not of itself establish relators' right, but he must prove his title. *People v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 812.



rily the judgment determines the rights both of the respondent and the relator, finding one to be and the other not to be entitled to the office according to the facts.<sup>1</sup>

Where, under the statutes, the relator is entitled to costs upon a judgment of ouster, the fact that the term of office of the usurper has expired since the beginning of the proceeding<sup>2</sup> or that he has vacated<sup>3</sup> or resigned<sup>4</sup> the office, does not ordinarily operate to prevent the rendition of the judgment, but the court will proceed to settle the rights of the parties and to award judgment.

The imposition of a fine is usually a matter resting in the sound discretion of the court, and where no improper motives are shown it will usually be merely nominal.<sup>5</sup>

§ 497. **Effect of the Judgment.**—"It is foreign to the objects and functions of the writ of *quo warranto*," says SMITH, J., in a leading case in Wisconsin, "to direct any officer what to do. It

If relator's right is in doubt, judgment may be given against the respondent, leaving relator's title to be settled in another proceeding. *People v. Phillips*, 1 Denio (N. Y.) 338.

"The title of a relator can only be adjudicated when, upon the facts lawfully established in the cause, his right necessarily appears from the finding. It is no part of the principal issue in the cause, and disproving respondent's right does not establish his; *People v. Connor*, 13 Mich. 238; *People v. Miles*, 2 Mich. 348; *People v. Knight*, 13 Mich. 230." *People v. Molitor*, 23 Mich. 341.

<sup>1</sup> In Michigan, the statute (H. S. § 8638) provides: "In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so entitled; or only upon the right of the defendant, as justice shall require."

<sup>2</sup> *People v. Hartwell*, 12 Mich. 508, 86 Am. Dec. 70; *People v. Loomis*, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33. In the latter case NELSON, J., said:

"The remedy must be entirely fruitless in this case, as the term of office of the defendants has long ago expired. If application had been made for the *quo warranto*, we should have denied it, as was done in the *People v. Sweeting*, 2 Johns. 184. Although judgment of ouster will be unavailing, and the damages, if a suggestion be made, must be very trifling, still I am of opinion we can not suspend the judgment, as the revised statutes are imperative, and give to the prevailing parties costs."

To like effect: *Hammer v. State*, 44 N. J. L. 667; *State v. Pierce*, 35 Wis. 93.

But *contra*, see *State v. Porter*, 59 Iowa 19, and see *State v. Jacobs*, 17 Ohio 143, and *State v. Ward*, 17 Ohio St. 543.

<sup>3</sup> *King v. Williams*, 1 Black. W. 93. See also *State v. Taylor*, 12 Ohio St. 130.

<sup>4</sup> *King v. Warlow*, 2 M. & S. 75.

<sup>5</sup> *State v. Brown*, 5 R. I. 1.

is never directed to an *officer* as such, but always to the *person*—not to dictate to him what he shall do in his office, but to ascertain whether he is constitutionally and legally authorized to perform any act in or exercise any functions of the office to which he lays claim.”<sup>1</sup>

It is, therefore, held in that case “that a judgment of ouster against the incumbent of an office in no way affects the office. Its duties are the same, whether the original incumbent remains in it, or whether another is substituted in his place. If a removal from an office by a judgment of ouster against the incumbent would affect the office itself, so also would a removal by the death of the incumbent or his resignation. In all these cases we think the office is in no way affected. It remains as it was before the removal.”<sup>2</sup>

But while the office thus remains the same, the legal effect of the judgment of ouster upon the pretended officer is to completely remove him from the office, to render null and void all his pretended official acts after the rendition of the judgment, to deprive him of all further official authority,<sup>3</sup> and to conclude him from again asserting title to the same office by virtue of any prior election or appointment.<sup>4</sup> But a judgment of ouster does not affect one who was not in any way a party to the action.<sup>5</sup> Hence while subordinates or assistants appointed by or holding under the deposed officer, and whose title is dependent upon his, lose their offices when his ceases,<sup>6</sup> yet where an assistant does not derive his office from, or in any manner hold under the deposed officer, the judgment against the latter in no way concludes the former.<sup>7</sup>

§ 498. **Damages for Usurpation.**—The awarding of damages to the relator against the respondent for the unlawful usurpation and detention of the office was no part of the functions of the

<sup>1</sup> Attorney-General v. Barstow, 4 Wis. 567, at p. 778.

<sup>2</sup> Attorney-General v. Barstow, 4 Wis. 567, at p. 659.

<sup>3</sup> State v. Johnson, 40 Ga. 164; King v. Serle, 8 Mod. 832.

<sup>4</sup> King v. Clarke, 2 East 75.

<sup>5</sup> People v. Murray, 78 N. Y. 535;

State v. Camden, 47 N. J. L. 454; Campbell v. Hall, 16 N. Y. 575.

<sup>6</sup> King v. Lisle, Andrews 163; King v. Hebden, Andrews 889; King v. Grimes, 5 Burr. 2599; King v. Mayor, 5 D. & E. 66; People v. Anthony, 6 Hun (N. Y.) 142; People v. Murray, 78 N. Y. 535.

<sup>7</sup> People v. Murray, 78 N. Y. 535.

common law proceeding, but the modern statutes have in some cases so enlarged its scope as to permit the relator to claim and recover such damages.<sup>1</sup>

When so awarded, they are determined by substantially the same rules which prevail in other cases. The relator's right to damages covers the whole period of his exclusion, and the extent of the recovery is to be measured by what he has lost.<sup>2</sup> Where a salary is attached to the office, it would ordinarily furnish the measure,<sup>3</sup> but where there is no salary the revenue of the office would be ascertainable by other means.<sup>4</sup>

The fact that the respondent acted in good faith would not prevent the relator from recovering the actual damages sustained,<sup>5</sup> nor would he be compelled to allow the respondent to set off the value of the latter's services in performing the duties during the time he held the office.<sup>6</sup>

§ 499. *Costs.*—The same statutes usually provide for the recovery of costs by the successful party.<sup>7</sup>

<sup>1</sup>Thus in Michigan, by H. S., § 8641-3, the relator may at any time within a year from the judgment in his favor, file a suggestion as to damages, which shall be tried, and the relator "shall be entitled to recover the damages which he may have sustained by reason of the usurpation." *People v. Miles*, 2 Mich. 850; *People v. Hartwell*, 12 Mich. 522, 86 Am. Dec. 70; *People v. Cicott*, 15 Mich. 327; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 181; *Comstock v. Grand Rapids*, 40 Mich. 397; *People v. Sackett*, 15 Mich. 315.

<sup>2</sup>*People v. Miller*, 24 Mich. 458, 9 Am. Rep. 181.

<sup>3</sup>See *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 181; *Auditors v.*

*Benoit*, 20 Mich. 176, 4 Am. Rep. 382; *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168; *Matthews v. Supervisors*, 53 Miss. 715, 24 Am. Rep. 715; *McCue v. Wapello County*, 56 Iowa 698, 41 Am. Rep. 184; *Commissioners v. Anderson*, 20 Kana. 298, 27 Am. Rep. 171; *McVeany v. Mayor*, 80 N. Y. 185, 36 Am. Rep. 600.

<sup>4</sup>See *Stuhr v. Curran*, 15 Vt. om (N. J.) 181, 43 Am. Rep. 353.

<sup>5</sup>*People v. Miller*, 24 Mich. 458, 9 Am. Rep. 181.

<sup>6</sup>*People v. Miller*, 24 Mich. 458, 9 Am. Rep. 181.

<sup>7</sup>*Peter v. Blue*, 40 Kana. —, 20 Pac. Rep. 853; *Moss v. Patterson*, 40 Kana. 720, 20 Pac. Rep. 457.

## BOOK III.

### OF THE AUTHORITY OF OFFICERS, AND THE MANNER OF ITS EXECUTION.

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#### CHAPTER I.

##### OF THE NATURE AND EXTENT OF THE AUTHORITY.

§ 500. Purpose of this Chapter:

I. OF THE SOURCE OF THE AUTHORITY.

- 501. Authority is created by Law.
- 502. Same Subject—Statutory and Common Law offices.
- 503. Authority may be changed by Law.
- 504. Same Subject—Authority of constitutional Office cannot be affected by Legislature.

II. OF THE NATURE OF THE AUTHORITY.

- 505. Authority varies with Nature of Office.
- 506. Authority of public Officer must be ascertained.
- 507. What constitutes Authority.
- 508. Authority confined to territorial Limits.
- 509. Authority limited to official Term.
- 510. Same Subject—Exceptions—Completing Service, Correcting Record.
- 511. Grants of Power strictly construed.

§ 512. Same Subject—How differs from private Agency.

- 513. Same Subject—Limits to Discretion.
- 514. Judicial Power limited to Jurisdiction conferred.
- 515. Judicial Power can be conferred only on judicial Offices.
- 516. Same Subject—General and special Jurisdiction.
- 517. Disqualification of Judge from acting—1. By Interest.
- 518. Same Subject—2. By Relationship or Affinity.
- 519. Same Subject—3. By friendly or hostile Relations.
- 520. Same Subject—4. By having been Counsel for either Party.
- 521. Legislative Power limited by the Constitution.
- 522. Ministerial Powers limited to those expressly granted or necessarily implied.
- 523. Ministerial Officer cannot question Validity of Law requiring his Action.

§ 524. Ministerial Officer cannot act in his own Behalf.

525. Presumption of Authority.

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559. Ratification Irrevocable.

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560. Ratification releases Officer from Liability to Principal.

3. *As between Principal and the other Party.*

561. a. Other Party against Principal.

562. b. Principal against the other Party.

4. *As between Officer and other Party.*

563. Ratification releases Officer on Contract.

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§ 500. Purpose of this Chapter.—It is obviously impossible, within the limits necessarily fixed to such a work as this, to undertake to go into a detailed examination of the authority of

the various classes of public officers. But the general principles by which the question of the source, nature and extent of the authority of public officers is to be determined, can and will be here considered.

## I.

### OF THE SOURCE OF THE AUTHORITY.

§ 501. **Authority is created by Law.**—Under our political system, as has been already stated, the entire source of public governmental authority is found in the people themselves. Either directly or through their chosen representatives, they create such offices and agencies as they deem to be desirable for the administration of the public functions, and declare in what manner and by what persons they shall be exercised.<sup>1</sup> They prescribe the quantum of power to be attached to each department, and the conditions upon which its continuation depends. Their will, in these respects, finds its expression in their constitutions and laws.

The right to be a public officer, then, or to exercise the powers and authority of a public office, must find its source in some provision of the public law.<sup>2</sup>

Where, however, there is a law which authorizes the officer's act, it is immaterial whether he *intended* to act under that law or not.<sup>3</sup>

§ 502. **Same Subject—Statutory and Common Law Offices.**—But while the source of the authority of every public officer is

<sup>1</sup> "A public office is an agency for the State, and the person whose duty it is to perform the agency is a public officer. This, we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts or series of acts for the State." PEARSON, C. J., in *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488.

<sup>2</sup> "It is a principle universally set-

tled in our system that all officers and functionaries exercising powers of government and control over political action must derive their powers and office, either from the people directly, or from the agents or representatives of the people. CAMPBELL, J., in *Attorney-General v. Detroit Common Council*, 58 Mich. 213, 219, 55 Am. Rep. 675.

<sup>3</sup> *Davis v. Brace*, 83 Ill. 542.

thus found in some public law, the nature and extent of that authority or the manner of its exercise are not always prescribed in express terms in the written law.

Where the office is a new one, or one unknown to the common law, the nature and extent of the authority and the terms, manner and conditions of its exercise must be set forth, in some express enactment, with sufficient clearness and fullness to enable it to be interpreted and executed with reasonable certainty.<sup>1</sup>

Where, however, the office is one which was recognized and regulated by the common law, while it is undoubtedly competent for the law-making power to expand or curtail its limits or declare the manner in which it is to be exercised, yet where this has not been done, but, as is customary in the case of sheriffs, coroners, constables and other common-law officers, the office is simply created by name without any definition of its powers and duties, it will be presumed that the intention was that the office should be exercised as at common law and the common-law incidents, powers and limitations will attach to it.<sup>2</sup>

§ 503. **Authority may be changed by Law.**—Where the office is one created by the legislature or lesser municipal body,

<sup>1</sup> In *Morton v. Comptroller General*, 4 S. C. 430, 442, WILLARD, J. in speaking of statutes creating public offices, says: "Where the rights, obligations or powers which are the subject of the statute appertain to a public function of the government, to be exercised through or by means of a public office, such office, by its established title, or the public officer who holds it, by his name of office, is, according to parliamentary usage and common understanding, the immediate and direct subject of the statute.

If the statute intends merely a modification of some particular power or duty appertaining to an existing office, the office is still, in a reasonable sense, the proper subject of the statute; but if, as in the present case, the object of the statute is to create or bring into existence an office not theretofore existing, such office is, in the strictest

sense, the proper subject of the statute.

In a statute creating a public office, whatever is regarded by the legislature as requisite to describe or establish the nature of the office, the character, limit and effect of the powers communicated, the nature and extent of the duties intended to be imposed on its incumbent, and the official and personal rights intended to be claimed and exercised by such incumbent, as well as all provisions intended to afford means of carrying out the objects contemplated by the establishment of such office, may be regarded as part of the subject-matter and entering into the proper subject of the statute."

<sup>2</sup> See *Allor v. Wayne County Auditors*, 48 Mich. 76; *King v. Hunter*, 65 N. C. 608, 6 Am. Rep. 754; *State v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84.

that body has, as has been seen,<sup>1</sup> complete control over the office. It may, therefore, increase or diminish its authority at pleasure, even during the term of the then incumbent.<sup>2</sup>

§ 504. **Same Subject—Authority of constitutional Office can not be affected by the Legislature.**—Where, however, the office is one provided for by the constitution, even though that instrument does not define its powers and duties, it cannot be denuded of its duties and functions by the legislature.<sup>3</sup>

## II.

### OF THE NATURE OF THE AUTHORITY.

§ 505. **Varies with Nature of Office.**—In the case of private agents, it is common to classify authorities according to their nature and effect, into universal, general and special agencies.<sup>4</sup> It will be evident, however, that this classification cannot apply in its entirety to the case of public agents. Universal authority in any public agent cannot exist under our constitutional government. Public officers there are, however, whose authority is general in its nature, while that of others is expressly limited and special.

But beyond this, the analogies between public and private agents are not sufficiently close to make the authority in the one case the criterion for that in the other.

Thus—

§ 506. **Authority of Public Officer must be ascertained.**—The authority of the public officer being created by law or being a matter of public record, of which every person interested is bound to take notice, it is presumed that all persons having occa-

<sup>1</sup> See *ante*, § 465.

<sup>2</sup> *State v. Douglass*, 26 Wis. 428, 7 Am. Rep. 87; *People v. Morrell*, 21 Wend. (N. Y.) 563; *Conner v. Mayor*, 5 N. Y. 285; *Commonwealth v. Bacon*, 6 S. & R. (Penn.) 822; *Commonwealth v. Mann*, 5 W. & S. (Penn.) 418; *Augusta v. Sweeney*, 44 Ga. 468, 9 Am. Rep. 172; *Butler v. Pennsylvania*, 10 How. (U. S.) 402.

<sup>3</sup> *State v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84; *King v. Hunter*, 65 N. C. 603, 6 Am. Rep. 754; *Commonwealth v. Gamble*, 62 Penn. St. 343, 1 Am. Rep. 422; *Allor v. Wayne County Auditors*, 48 Mich. 76; *Matter of Head Notes*, 48 Mich. 641.

<sup>4</sup> *Mechem on Agency*, § 271-292.



sion to deal with a public officer have knowledge of his authority.<sup>1</sup> It is not enough, therefore, for such persons to rely upon any mere presumptions as to the officer's authority, but they must see to it that it is in fact sufficient for the assumed purpose.

§ 507. **What constitutes Authority.**—The authority of a public officer in any given case consists of those powers which are expressly conferred upon him by the act appointing him, or which are expressly annexed to the office by the law creating it or some other law referring to it, or which are attached to the office by common law as incidents to it.

Of the former kind are the powers of special statutory offices where the statute prescribes the limits within which they are to be exercised. Of the latter kind are the familiar common law offices such as that of sheriff, constable and the like, to which when created by law without more, the usual common law powers and duties attach.

§ 508. **Authority confined to territorial Limits.**—The authority of public officers being derived from the law, it necessarily follows that the authority can not exist in places where that law has no effect. The authority of all public officers is, therefore, limited and confined to that territory over which the law, by virtue of which they claim, has sovereign force.

But not only this, for public officers in general, and particularly those chosen within and for the lesser municipal subdivisions such as counties, towns and cities, are elected or appointed such in and for some specified district or territory as such county, town or city, and, unless greater authority is expressly conferred upon them, it is the general rule that their official authority is limited to the district within and for which they were chosen.

Thus a state officer can exercise no official authority beyond the confines of the State.\* So, without express authority, a

<sup>1</sup> Mayor of Baltimore v. Eschbach, 18 Md. 282; Mayor of Baltimore v. Reynolds, 20 Md. 1, 38 Am. Dec. 535; State v. Bank, 45 Mo. 528; Lee v. Munroe, 7 Cranch (U. S.) 366; Clark v. Des Moines, 19 Iowa 199, 87 Am. Dec. 423; State v. Hays, 52 Mo. 573; Wal-

lace v. Mayor, 29 Cal. 181; Sutro v. Pettit, 74 Cal. 332, 5 Am. St. Rep. 442; Day Co. v. State, 68 Tex. 526; Tamm v. Lavalle, 92 Ill. 263.

\* Jackson v. Humphrey, 1 Johns. (N. Y.) 493.

sheriff can not execute civil process beyond the limits of his county;<sup>1</sup> a justice of the peace can not hold court or exercise judicial functions or take acknowledgments outside of the county within and for which he was elected;<sup>2</sup> a constable is not vested with official character when acting in a county to which he does not belong;<sup>3</sup> a United States marshal can not execute process beyond his district.<sup>4</sup>

§ 509. *Authority limited to official Term.*—So it is evident that the authority of the public officer must be limited in its exercise to that term during which he is by law invested with the rights and duties of the office. Subject to what has already been said in reference to *de facto* officers,<sup>5</sup> and to the right to hold over, it follows, therefore, that he can, in general, exercise no authority before his term begins or after it has terminated.

The same principle applies as well where the officer is one chosen for the performance of a single act as when he is chosen

<sup>1</sup> *Page v. Staples*, 13 R. I. 806. In this case, *MATTESON, J.* said: "In the absence of statutory provisions the power of a sheriff is limited to his own county. He is to be adjudged a sheriff in his own county and not elsewhere. He can not, therefore, execute a writ out of his own county, and if he attempts to do so he becomes a trespasser. The only exceptions to this principle are that having a prisoner in his custody upon a writ of *habeas corpus* he has power, by virtue of the writ, to travel through other counties, if necessary, in order to take his prisoner to the place where the writ is returnable; and he may also, upon fresh pursuit, retake a prisoner who has escaped from his custody into another county. *Platt v. The Sheriffs of London*, *Plowd.* 85, 37; *Hammond v. Taylor*, 8 B. & A. 408; *Watson's Sheriff*, 60, 61; *Avery v. Seely*, 8 Watts & Serg. 494, 497. In the case at bar the prisoner did not escape from the defendant's custody into Kent county, but was voluntarily

taken by the defendant into that county. The moment they crossed the line between the counties into Kent county the defendant ceased to have any authority over the plaintiff. He had no more right to detain him in that county than he would have had to arrest him there."

See also *Mitchell v. Malone*, 77 Ga. 301.

<sup>2</sup> *Share v. Anderson*, 7 Serg. & R. (Penn.) 43, 10 Am. Dec. 421; *Brown v. McCormick*, 28 Mich. 215; *Glittings v. Hall*, 1 H. & J. (Md.) 14, 2 Am. Dec. 502.

<sup>3</sup> *People v. Burt*, 51 Mich. 199. Constables, however, are not merely local officers: "They are ministers of public justice, and in that capacity are State ministerial officers, with some powers strictly local and some not local." *Drain Commissioner v. Baxter*, 57 Mich. 127. See also *Allor v. Wayne County Auditors*, 48 Mich. 76.

<sup>4</sup> *Carr v. Phillips*, 39 Mich. 319.

<sup>5</sup> See *ante*, §§ 815-846.

for a definite term. When chosen to act in reference to a particular subject his powers exhaust themselves in the acting, and having once acted he is henceforth *functus officio* and can neither act again in reference to the same subject-matter nor undo what he has done.<sup>1</sup>

§ 510. **Same Subject—Exceptions—Completing Service—Correcting Records.**—But this rule that authority ceases at the expiration of the term of office is subject to certain well recognized exceptions.

Thus it is a well settled rule of the common law, recognized and confirmed by statutes, that when an executive officer, *e. g.*, a sheriff,<sup>2</sup> has during his term begun a service or commenced the performance of a duty and thereby incurred a responsibility, he has not only the authority but is ordinarily bound to go on and complete it although his official term may sooner expire.<sup>3</sup>

So it is held that a court may, after the expiration of his term, permit the record of his official action to be so amended or corrected by him as to conform to the true state of the facts.<sup>4</sup> But the

<sup>1</sup> *State v. Donnaworth*, 21 Ohio St. 216; *Attorney-General v. Iron County Canvassers*, 64 Mich. 607.

<sup>2</sup> Sheriff may and should complete service or execution of process begun by him while in office, notwithstanding that his term has since expired. *Allen v. Trimble*, 4 Bibb. (Ky.) 21, 7 Am. Dec. 726; *Purl v. Duvall*, 5 H. & J. (Md.) 69, 9 Am. Dec. 490; *Lemon v. Craddock*, Litt. Sel. Cas. (Ky.) 251, 12 Am. Dec. 301; *Tukey v. Smith*, 18 Me. 125, 36 Am. Dec. 704; *People v. Boring*, 8 Cal. 406, 68 Am. Dec. 331. Thus he may make a deed after expiration of office for land sold by him while in office. *Allen v. Trimble*, *supra*; *Lemon v. Craddock*, *supra*; he may sell property after expiration which was seized before. *Purl v. Duvall*, *supra*; he may receive redemption money after expiration of term for land previously sold. *Elkin v. People*, 3 Scam. (Ill.) 207, 36 Am. Dec. 541; he may retain possession of

property previously seized to await judgment and execution. *Tukey v. Smith*, *supra*; he may and should complete a levy begun during his term. *State v. Roberts*, 7 Halst. (N. J.) 114, 21 Am. Dec. 62. Same rule applies to deputies. *Tuttle v. Jackson*, 6 Wend. (N. Y.) 224.

See also *Clark v. Pratt*, 53 Mo. 546; *Newman v. Beckwith*, 61 N. Y. 305; *Crane v. Hardy*, 1 Mich. 56; *Miner v. Cassat*, 2 Ohio St. 198; *Doolittle v. Bryan*, 14 How. (U. S.) 563.

*Contra*, *Bank of Tennessee v. Beatty*, 3 Sneed. (Tenn.) 305, 65 Am. Dec. 53.

<sup>3</sup> *Lawrence v. Rice*, 12 Metc. (Mass.) 533, per SHAW, C. J.

<sup>4</sup> *Kiley v. Cranor*, 51 Mo. 541; *Kiley v. Oppenheimer*, 55 Mo. 374; *Gibson v. Bailey*, 9 N. H. 168; *Roberts v. Holmes*, 54 id. 560; *Pierce v. Richardson*, 37 id. 306. *Contra*, see *People v. Commissioners*, 16 Mich. 63; *Hartwell v. Littleton*, 13 Pick. 229; *Langdon v. Poor*, 20 Vt. 13.

amendment must, in all cases, be made by the person who was in office when the proceedings in question were had and not by a stranger.<sup>1</sup>

A former public officer, however, has no authority to certify proceedings had before him while in office.<sup>2</sup>

§ 511. **Grants of Power strictly construed.**—Express grants of power to public officers are usually subjected to a strict interpretation,<sup>3</sup> and will be construed as conferring those powers only which are expressly imposed or necessarily implied.<sup>4</sup>

Such an officer, therefore, can create rights against the State or other public authority represented by him, only while he is keeping strictly within the limits of his authority as so construed.<sup>5</sup>

<sup>1</sup> Gibson v. Bailey, 9 N. H. 168.

<sup>2</sup> Gaillard v. Anceline, 10 Mart. (La.) 479, 13 Am. Dec. 888.

<sup>3</sup> Green v. Beeson, 81 Ind. 7.

<sup>4</sup> Vose v. Deane, 7 Mass. 280.

<sup>5</sup> Mayor of Baltimore v. Eschbach, 16 Md. 282; Mayor of Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; Clark v. Des Moines, 19 Iowa 199, 87 Am. Dec. 423. In this case, DILLON, J. says: "The general principle of law is well known and definitely settled that the agents, officers or even city council of a municipal corporation can not bind the corporation when they transcend their lawful and legitimate powers.

This doctrine rests upon this reasonable ground: The body corporate is constituted of all the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Every one, therefore, may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of

the rule, that the corporation is bound only when its agents, by whom from the very nature of its being it must act if it acts at all, keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of *ultra vires*; that is, set up as a defense its own want of power under its charter or constituent statute to enter into a given contract or to do a given act in violation or excess of its corporate power and authority. The cases asserting these principles are numerous and uniform; some of the more important and striking ones need only be cited: Mayor of Albany v. Cunliff (city not liable for negligently building bridge under an unconstitutional statute) 2 N. Y. 165 (1849), reversing s. c. 2 Barb. 199; Cuyler v. Trustees of Rochester (laying out street contrary to charter), 13 Wend. (N. Y.) 165 (1834); Hodges v. Buffalo (4th of July appropriation) 2 Denio 110 (1846); Halstead v. Mayor, 3 N. Y. 430 (1850); Martin v. Mayor, 1 Hill 545; Boom v. Utica, 2 Barb. 104; Cornell v. Guilford, 1 Denio 510; Boyland v. Mayor and Aldermen of New York, 1 Sand. 27 (1847); Dill v. Wareham, 7 Metc. 438 (1844); Vincent v. Nantucket, 13 Cush. 103, 105 (1858), per MERRICK,

So it is well settled that when such officers undertake, by virtue of the authority conferred upon them, to build up rights against third persons, especially where their acts may result in penalties or forfeitures against such third persons, the limits and conditions imposed upon their authority must be rigidly observed or their acts will be unavailing.<sup>1</sup>

§ 512. *Same Subject—How differs from private Agency.—*

The fact that a given act might have been deemed to be within the scope of the authority if created by a private individual is not conclusive.<sup>2</sup> Thus in a case involving the validity of a contract made by the city commissioner of Baltimore, the court said: "Although a private agent, acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, the rule as to the effect of a like act of a public agent is otherwise. The city commissioner was the public agent of a municipal corporation, clothed with duties and powers specially defined and limited by ordinances bearing the character

J.; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Parsons v. Inhabitants of Goshen*, 11 Pick. 896; *Hood v. Inhabitants of Lynn*, 1 Allen, 103 (1861); *Spaulding v. Lowell*, 28 Pick. 71; *Mitchell v. Rockland*, 41 Me. 363 (1858) a. c. 41 Me. 363, 66 Am. Dec. 252; *Anthony v. Adams*, 1 Met. 284 (1840); *Western College v. Cleveland*, 12 Ohio St. 375 (1861); *Commissioners v. Cox*, 6 Ind. 403 (1855); *Inhabitants v. Weir*, 9 Ind. 224 (1857); *Smead v. Indianapolis, &c. R. R. Co.* 11 Ind. 104 (1858); *Brady v. Mayor*, 20 N. Y. 812; *Appleby v. Mayor*, 15 How. Pr. 428; *Estep v. Keokuk County*, 18 Iowa 199, and cases cited by COLE, J.; *Clark v. Polk County*, 19 Iowa 247."

A State officer can only deal or contract in relation to the property of the State when he is authorized so to do by the express provisions of law; and any agreement he may make, or attempt to make, in relation to such property, when he is not so author-

ized is void as against the State. *McCaslin v. State*, 99 Ind. 428, 440.

See also *State v. Hastings*, 12 Wis. 596; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Yancey v. Hopkins*, 1 Munf. (Va.) 419.

<sup>1</sup> See *post*, § 522.

<sup>2</sup> *Mechem on Agency*, § 292. *Mayor of Baltimore v. Eschbach*, 18 Md. 282; *Mayor of Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *State v. Hays*, 53 Mo. 578; *Tamm v. Lavalle*, 92 Ill. 263.

By the law of agency at the common law there is this difference between individuals and the government; the former are liable to the extent of the power they have apparently given to their agents, while the government is liable only to the extent of the power it has actually given to its officers. Per LORING, J., in *Pierce v. United States*, 1 Nott & Hun (U. S. Ct. of Cl.) 270, a. c., *sub nom* *The Floyd Acceptances*, 7 Wall. (U. S.) 666.

and force of public laws, ignorance of which can be presumed in favor of no one dealing with him on matters thus conditionally within his official discretion. For this reason, the law makes a distinction between the effect of the acts of an officer of a corporation and those of an agent for a principal in common cases. In the latter, the extent of authority is necessarily known only to the principal and agent, while in the former it is a matter of record in the books of the corporation or of public law."<sup>1</sup>

The language of Judge STORY upon this subject is also quoted with approval: "In respect to the acts and declarations and representations of public agents, it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter, the principals are in many cases bound, where they have not authorized the declarations and representations to be made. But in cases of public agents, the government or other public authority is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed, in his capacity as a public agent, to make the declaration or representation for the government. Indeed, this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake, or rashness and indiscretion of their agents. And there is no hardship in requiring from private persons dealing with public officers the duty of inquiring as to their real or apparent power and authority to bind the government."<sup>2</sup>

§ 513. *Same Subject—Limit to Discretion.*—So although the terms of the law creating the authority confer upon the officer general discretionary power without qualification, his authority is not to be deemed an unlimited one. The exercise of the officer's discretion is still limited, by legal construction, to the evident purposes of the act, and to what is known as a sound and legal discretion, excluding all arbitrary, capricious, inquisitorial and oppressive proceedings.<sup>3</sup>

<sup>1</sup> *Mayor of Baltimore v. Eschbach*, 18 Md. 282.

<sup>2</sup> *Story on Agency*, § 807 a.

<sup>3</sup> *United States v. Doherty*, 27 Fed. Rep. 780; *Rose v. Stuyvesant*, 8

*Johns. (N. Y.)* 426; *President, &c. v. Patchen*, 8 Wend. (N. Y.) 47; *In re Holbrook*, 99 N. Y. 539, 2 N. East. Rep. 887; *United States v. Kirby*, 7 Wall. (U. S.) 486.

§ 514. **Judicial Power limited to Jurisdiction conferred.**—

The judicial power of the government is usually vested by express provisions of the constitution in certain courts and officers therein named or provided for. The effect of the provisions is to vest the *whole* judicial power of the State in the courts and officers named in the constitution, unless there is some further provision therein conferring upon some other court or officer a portion of such judicial power, or authorizing the legislature to confer it; and in the latter case, it can only be possessed or conferred by such further provision expressly or by a necessary implication which would have the effect to take the case out of the operation of the general provisions of the constitution.<sup>1</sup>

§ 515. **Judicial Power can be conferred only on judicial Officers.**—Under such provisions, therefore, judicial powers can only be conferred upon judicial officers,<sup>2</sup> and upon those only who are chosen in the manner prescribed by the constitution.<sup>3</sup>

Where the power is vested in the *court* as such, it exists only

<sup>1</sup> *Chandler v. Nash*, 5 Mich. 409, per CHRISTIANCY, J., citing 2 Story on Const. §§ 1590–1592; *People v. Maynard*, 14 Ill. 420; *Gibson v. Emerson*, 2 Eng. (Ark.) 173.

<sup>2</sup> *Allor v. Wayne County Auditors*, 43 Mich. 76; *Gough v. Dorsey*, 27 Wis. 119; *Attorney-General v. McDonald*, 3 Wis. 805; *Conroe v. Bull*, 7 Wis. 408; *Gregory v. State*, 94 Ind. 884, 48 Am. Rep. 162; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *Schoultz v. McPheeters*, 79 Ind. 373; *Wright v. Defrees*, 8 Ind. 298; *Waldo Wallace*, 12 Ind. 569; *Columbus, &c., Ry. Co. v. Board*, 65 Ind. 427.

Where the constitution vests all judicial powers in certain courts and justices of the peace, a statute permitting parties to a cause to stipulate that, in case of the disqualification of the judge, it shall be tried before some member of the bar agreed upon by them, who "shall have all the powers and perform all the duties of

the judge of said court in said cause," is unconstitutional and void, and a judgment rendered by such member of the bar is void. *Van Slyke v. Trempealeau Ins. Co.*, 39 Wis. 390, 20 Am. Rep. 50.

Where the constitution vests the judicial powers in certain courts and justices of the peace, a statute authorizing a notary public to exercise judicial powers in case of the disqualification of the proper officer, is void. *Chandler v. Nash*, 5 Mich. 409.

Under like provisions, a statute giving the clerk of a court power to fix the amount of bail is unconstitutional as conferring judicial power upon a ministerial officer. *Gregory v. State*, 94 Ind. 884, 48 Am. Rep. 162.

<sup>3</sup> Where, by the constitution, judicial officers are to be *elected* by the people, judicial powers cannot be conferred upon an officer appointed. *Chandler v. Nash*, 5 Mich. 409.

in the court, and the judges, as judges, out of court do not possess it and cannot be vested with it.<sup>1</sup>

§ 516. **Same Subject—General and special Jurisdiction.**—The jurisdiction conferred upon the judicial officer may be one of two kinds. It may be an authority to act in all cases at law or in equity which may be brought before him, or, in other words, a *general* jurisdiction; or it may be an authority to act in special cases only or only upon certain conditions and contingencies, in which case it may be called a *special* jurisdiction. In neither case is the jurisdiction unlimited, but it is obviously much greater in the former case than in the latter, and a much different presumption is indulged in one case than in the other. For it is the constant presumption of the law, in respect to courts of general jurisdiction, that they had jurisdiction over a case in which they have assumed to act;<sup>2</sup> while, in respect to courts of special or limited jurisdiction, no such presumption is indulged, but whoever claims any right or benefit under the actions of such a court must show affirmatively that it had jurisdiction.<sup>3</sup>

§ 517. **Disqualification of Judge from acting—1. By Interest.**—“It is a maxim of every code in every country,” says SANDFORD, Chancellor,<sup>4</sup> “that no man shall be judge in his own cause. The learned wisdom of enlightened nations, and the unlettered ideas of ruder societies, are in full accordance upon this point, and wherever tribunals of justice have existed, all men have agreed that a judge shall never have the power to decide where

<sup>1</sup> Toledo, &c. Ry. Co. v. Dunlap, 47 Mich. 456. See also Risser v. Hoyt, 53 Mich. 185.

<sup>2</sup> Butcher v. Bank of Brownsville, 3 Kana. 70, 88 Am. Dec. 446; Shumway v. Stillman, 4 Cow. (N. Y.) 294, 15 Am. Dec. 374; Reynolds v. Stansbury, 20 Ohio 344, 55 Am. Dec. 459; Cooper v. Sunderland, 3 Iowa 114, 46 Am. Dec. 52; Withers v. Patterson, 27 Tex. 491, 86 Am. Dec. 648; Cook v. Skelton, 20 Ill. 107, 71 Am. Dec. 250.

<sup>3</sup> Roderigas v. East River Sav. Institution, 63 N. Y. 460, 20 Am. Rep.

555; Reynolds v. Stansbury, 20 Ohio 344, 55 Am. Dec. 459; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Mallett v. Mining Co. 1 Nev. 188, 90 Am. Dec. 484; Bloom v. Burdick, 1 Hill (N. Y.) 180, 37 Am. Dec. 299; Foot v. Stevens, 17 Wend. (N. Y.) 485; Wheeler v. Raymond, 8 Cow. (N. Y.) 814; Adams v. Jeffries, 12 Ohio 253, 40 Am. Dec. 477; Lowry v. Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 557.

<sup>4</sup> In Washington Ins. Co. v. Price. Hopk. (N. Y.) Ch. 1. See also Hall v. Thayer, 105 Mass. 219, 7 Am. Rep. 513.



he is himself a party. In England, it has always been held that however comprehensive may be the terms by which jurisdiction is conferred upon a judge, the power to decide in his own cause is always a tacit exception to the authority of his office. Such I conceive to be the law of this State."

"No man ought to be judge in his own cause, is a maxim," says BELL, C. J.<sup>1</sup> "aimed at the most dangerous source of partiality in a judge."<sup>2</sup> It is not necessary that a judge should be a party to the cause to create this disqualification. If he is interested in a suit brought in another's name, he is equally disqualified.<sup>3</sup> Any, the slightest pecuniary, interest in the result, not merely possible and contingent;<sup>4</sup> though merely as trustee or executor,<sup>5</sup> and though indemnified,<sup>6</sup> even the interest which would, in former times, have disqualified a party to be a witness,—will be quite sufficient."<sup>7</sup>

The members of partnerships and corporations,<sup>8</sup> though their interest may be very trifling,<sup>9</sup> are nevertheless disqualified;<sup>10</sup> except in cases where a party is a mere inhabitant of a public municipal corporation as a town or county, entitled to receive the fines and costs imposed on offenders. In such cases, the

<sup>1</sup> In *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

<sup>2</sup> Citing *Peck v. Freeholders*, 20 N. J. L. 457; *Hawley v. Baldwin*, 19 Conn. 585; *Russell v. Perry*, 14 N. H. 152; *Allen v. Bruce*, 12 N. H. 418; Dig. I., 1 tit. De Jurisdictione; 1 Brooke's Abr. 177, tit. Conusans, 27; Broom's Maxims, 84; Co. Lit. 141a; Id. Sec. 212; *Derby's Case*, 12 Coke 114; Dig. L. 5, tit. 1, 17.

See also *Peninsular R. R. Co. v. Howard*, 20 Mich. 25.

<sup>3</sup> Citing *Foot v. Morgan*, 1 Hill (N. Y.) 654; *Wright v. Crump*, 2 Ld. Raym. 766.

<sup>4</sup> Citing *Steamship Co. v. Livingston*, 8 Cow. (N. Y.) 724; *Hawes v. Humphrey*, 9 Pick. (Mass.) 850, 20 Am. Dec. 481; *Wilbraham v. County Com'rs*, 11 Pick. 322; *Danvers v. County Com'rs*, 2 Metc. (Mass.) 185; *Peck v. Freeholders*, 20 N. J. L. 457;

*Northampton v. Smith*, 11 Metc. (Mass.) 390.

<sup>5</sup> Citing *Knight v. Hardeman*, 17 Ga. 253.

<sup>6</sup> Citing *Oakley v. Aspinwall*, 8 N. Y. 547.

<sup>7</sup> Citing *Smith v. Boston, &c., R. R.*, 86 N. H. 492; *Derby's Case*, 12 Coke 114; 1 Rolle Abr. 491, 2; *Day v. Savage*, Hob. 87; *Ranger v. Great Western Ry. Co.* 27 Eng. L. & Eq. 35; *Baldwin v. McArthur*, 17 Barb. (N. Y.) 414.

<sup>8</sup> Citing *Voet ad Pand.*, lib. 5, tit. 2, 45, *Washington Ins. Co. v. Price*, 1 Hopk. Ch. 1; *Place v. Butternuts, &c., Co.* 28 Barb. (N. Y.) 503; Dig. 49, 4, 11; *Pothier's Pro. Civ.* c. 2, 55.

<sup>9</sup> Citing *Gregory v. Railroad Co.*, 4 Ohio St. 675.

<sup>10</sup> Citing *Northampton v. Smith*, 11 Metc. 390; *Petition of Nashua*, 12 N. H. 425.

members of such corporations are not disqualified, either as judges or jurors.<sup>1</sup>

Generally, an interest in the question, as distinct from a pecuniary interest in the result of the cause is no valid ground for recusation.<sup>2</sup> To this, however, there is an exception: Where the judge has a lawsuit pending or impending with another person which rests upon a like state of facts, or upon the same points of law, as that pending before him,—this is a valid disqualification.<sup>3</sup>

§ 518. **Same Subject—2. By Relationship or Affinity.**—At the common law, relationship by affinity or consanguinity to a party in interest did not disqualify a judge.<sup>4</sup> But at the civil law and by statutes in most of the States the rule is different. Thus, continues BELL, C. J.,<sup>5</sup> “Relationship or affinity to either party in interest, though only a stockholder in a corporation,<sup>6</sup> or not a party to the suit,<sup>7</sup> is a cause of recusation by either,<sup>8</sup> in civil matters to the fourth degree at least, that is, to consins german inclusive.<sup>9</sup> In many jurisdictions, the exclusion extends much further.<sup>10</sup> The judge whose wife is related by blood or affinity to a party is recusable, as if he were of the same relationship himself; and *vice versa*, the judge related by blood or affinity to the

<sup>1</sup> Citing *London v. Wood*, 12 Mod. 636; *Northampton v. Smith*, 11 Metc. 390; *Hill v. Wells*, 6 Pick. 104; *Justices v. Fennimore*, 1 N. J. L. 190; *Commonwealth v. Emery*, 11 Cush. (Mass.) 406; *Commonwealth v. Burd-ling*, 12 *Id.* 506; *Commonwealth v. Tuttle*, 12 *Id.* 505; *Corwein v. Hames*, 11 Johns. (N. Y.) 76; *Wood v. Rice*, 6 Hill (N. Y.) 58.

<sup>2</sup> Citing *Northampton v. Smith*, 11 Metc. 390; *Pothier's Pro. Civ. c. 2, Sec. 5*; *People v. Edmonds*, 15 Barb. (N. Y.) 529.

<sup>3</sup> Citing *Davis v. Allen*, 11 Pick. (Mass.) 466, 25 Am. Dec. 886; *Ersk. Inst. tit. 2, 26*, *Pothier ubi sup.*; *Voet ad Pand. lib. 5, tit. 1, 44*.

<sup>4</sup> *Matter of Dodge v. Stevenson Mfg. Co.* 77 N. Y. 101; *Place v. Butternuts &c. Mfg. Co.* 28 Barb. (N. Y.) 503.

<sup>5</sup> In *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

<sup>6</sup> Citing *Place v. Butternuts &c. Co.*, 28 Barb. 503.

<sup>7</sup> Citing *Foot v. Morgan*, 1 Hill (N. Y.) 654.

<sup>8</sup> Citing *Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 724; *Kelly v. Hockett*, 10 Ind. 299; *Pothier Pro. Civ. c. 2 sec. 5*; *Dig. 47, 10, 5*; *Code du Pro. Civ. 378*; *Ersk. Inst. tit. 2, 33*; *Durand's Spec. Juris. 19*.

<sup>9</sup> Citing *Sanborn v. Fellows*, 23 N. H. 473; *Bean v. Quimby*, 5 *Id.* 98; *Gear v. Smith*, 9 *Id.* 63; *Voet ad Pand. lib. 5, tit. 1, 45*.

<sup>10</sup> Citing *Oakley v. Aspinwall*, 8 N. Y. 547; *Voet ad Pand. ubi sup.*; *People v. Cline*, 23 Barb. (N. Y.) 200; *Post v. Black*, 5 Denio (N. Y.) 66.

wife of a party is disqualified as he would be if related in the same degree to the party himself;<sup>1</sup> but the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife; as where the justice's brother married the plaintiff's sister, the justice was held related to the plaintiff's sister, but not at all to the plaintiff.<sup>2</sup> The affinity, and the recusation which results from it, is extinguished when the marriage, which forms it, is dissolved and there remains no issue of the marriage.<sup>3</sup> The judge is none the less recusable though related by blood or marriage in the same degree to both the parties.<sup>4</sup> The disability resulting from relationship is held by the civil law to extend much further, where, from the absence of nearer relatives, the judge and party stand in the relation of heirs presumptive to each other; and this rule seems to be founded in good reason."<sup>5</sup>

§ 519. **Same Subject—3. By friendly or hostile Relations.**—"The friendly or hostile relations," continues BELL, C. J.,<sup>6</sup> "existing between a judge and one of the parties may be good ground of recusation." Of the first class there are various circumstances referred to as examples indicating a state of feeling inconsistent with impartiality; as where the judge has received himself, or his near relative, important benefits or donations from one of the parties;<sup>7</sup> where the relation of master and servant exists between the judge and a party;<sup>8</sup> or where the relation of protection and subjection exists between the judge and a party, as in the case of a guardian and ward<sup>9</sup> *Qui jurisdictioni preest neque sibi jus dicere debet, neque uxori vel liberis suis, neque libertes vel caeteris quos secum habet.*<sup>10</sup> It is a good cause to remove a plea, that the bailiff who is the judge is of the robes of the

<sup>1</sup> Citing Paddock v. Wells, 2 Barb. Ch. 388; Carman v. Newell, 1 Denio (N. Y.) 25; Code Civ. Proc. 378; Pothier Pro. Civ. c. 2, sec. 50.

<sup>2</sup> Higbe v. Leonard, 1 Denio (N. Y.) 186.

<sup>3</sup> Citing Cain v. Ingham, 7 Cow. (N. Y.) 478 and note; Foot v. Morgan, 1 Hill (N. Y.) 654; see Winchester v. Hinsdale, 12 Conn. 88; Eggleston v. Smiley, 17 Johns. (N. Y.) 138.

<sup>4</sup> Citing Ersk. Inst. tit. 2, 26; Pothier Pro. Civ. c. 2, sec. 5.

<sup>5</sup> Citing Voet ad Pand. lib. 5, tit. 2, 45.

<sup>6</sup> In Moses v. Julian, 45 N. H. 52, 84 Am. Dec. 114.

<sup>7</sup> Citing Voet ad Pand. lib. 5, tit. 2, 45.

<sup>8</sup> Citing Pothier Pro. Civ. c. 2, sec. 5.

<sup>9</sup> Citing Pothier *ubi sup.*; Smith v. Boston &c. R. R. 36 N. H. 492.

<sup>10</sup> Citing Pothier *ubi sup.*

<sup>11</sup> Citing Dig. 2, 1, 10; Ersk. Inst. tit. 2, sec. 26; 1 Rolle Abr. 492; 6 Vin. Abr. 1, tit. Connissance O.

plaintiff.<sup>1</sup> But a creditor, lessee or debtor may be judge in the case of his debtor, landlord or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the judge may depend upon the success of his suit.<sup>2</sup>

Enmity, indicated by threats, verbal or written, pending or shortly preceding the suit,<sup>3</sup> or otherwise,<sup>4</sup> and a lawsuit pending between a judge and a party, are good causes for recusation. Generally, such a lawsuit between a party and the nearest relative of the judge is not sufficient cause of recusation, though this may depend upon the state of feeling between the judge and the party, to which the lawsuit has given rise. The bitterness of feeling resulting from a lawsuit is supposed to subside when the lawsuit has terminated. A party cannot disqualify a judge to sit in his case by bringing an action against him after the principal suit is commenced.

Under this head falls the class of cases where a judge has a bias or prejudice in favor of or against one of the parties. Such bias, caused by hearing an *ex parte* statement of the facts of a case would be a disqualification to try it. A judge, anxiously on his guard to hear nothing of the cases which may come before him, except what is said in court and in presence of the adverse party, may yet find that he has been imposed upon by artful statements designed to create a prejudice in his mind relative to the case. In such a case, he may well decline to sit in the case."<sup>5</sup>

§ 520. Same Subject—4. By having been Counsel of either Party.—So the fact that the judge has been of counsel to either party in the same suit is deemed a just cause of disqualification.<sup>6</sup>

§ 521. Legislative Power limited by the Constitution.—The government of the United States is one of enumerated powers.<sup>7</sup>

<sup>1</sup> Citing 12 H. 4, 13; S. P., Brooke Abr., *Cause a remover*, pl. 13.

<sup>2</sup> Citing, Pothier *ubi sup.*

<sup>3</sup> Citing Voet and Pothier *ubi sup.*

<sup>4</sup> Citing Turner v. Commonwealth, 2 Met. (Ky.) 619.

<sup>5</sup> Citing Williams v. Robinson, 6 Cush. (Mass.) 334.

<sup>6</sup> *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; citing Ten Eick v. Simpson, 11 Paige (N. Y.) 179; *McLaren v. Charrier*, 5 *Id.* 532, Pothier and Voet, *ubi sup.*, *State v. Houser*, 28 Mo. 233.

<sup>7</sup> *Cooley*, Const. Lim. 10.

In the words of Chief Justice MARSHALL, it "can claim no powers which are not granted to it by the constitution; and the powers actually granted must be such as are expressly given or given by necessary implication."<sup>1</sup>

In the case of the States, however, the rule is different. Their constitutions are not grants of power, but are rather limitations upon the powers which the States inherently possess.<sup>2</sup> The whole legislative power of the State being vested in the legislature, the legislative power of that body is absolute except so far as it is limited by the constitution.<sup>3</sup> The power to determine whether the limits imposed have been exceeded rests in the courts, but the courts will always presume that the legislature intended to keep within its constitutional powers and will only declare an act of the legislature void where the violation of the constitution is clear.<sup>4</sup>

But within its constitutional limits, the legislature is the sole and final judge of all questions of policy and equity,<sup>5</sup> and the courts are not at liberty to declare the acts of the legislature void because of their apparent injustice or impolicy, nor because in their opinion an act is opposed to what is believed to be the spirit of the constitution.<sup>6</sup>

But while its legislative power is thus practically absolute, the legislature cannot usurp the powers allotted to other departments of the government. It can not, therefore, exercise judicial power, nor directly or indirectly control the exercise by the courts of their judicial functions.<sup>7</sup>

<sup>1</sup> *Martin v. Hunter*, 1 Wheat. (U. S.) 304, 326.

<sup>2</sup> *Cooley*, Const. Lim. 11.

<sup>3</sup> *Cooley*, Const. Lim. 201.

<sup>4</sup> *Cooley*, Const. Lim. 205, 206.

<sup>5</sup> *Sheley v. Detroit*, 45 Mich. 431.

<sup>6</sup> *Cooley*, Const. Lim. 202, 207.

<sup>7</sup> "It is well settled," says COOLEY, J., in *Butler v. Supervisors*, 26 Mich. 22, 27, "that the apportionment of legislative power to one department of the government will not authorize it to exercise any portion of the judicial power, which is apportioned to another department. The apportion-

ment is, of itself, an implied prohibition upon the exercise by the legislature. That body, consequently, can not set aside a judgment or decree, nor can it even require the judiciary to give a new hearing in a case once passed upon. The line which separates judicial from legislative authority is clear and distinct, and the principle is so well settled and understood that it is seldom called in question, and probably not often violated except through inadvertence. A reference to a few of the many cases in which it has been applied is made here by

§ 522. **Ministerial Powers limited to those expressly granted or necessarily implied.**—The powers conferred upon ministerial officers, are, as has been seen,<sup>1</sup> ordinarily confined within the limits of a strict construction. From the very nature of the case a distinction arises. They are authorized to do acts,—not usually to exercise judgment or discretion. The manner of doing the act is often prescribed, but in any event no greater authority is required than that which suffices for accomplishing the purpose specified.

It is, therefore, the general rule that the authority of ministerial officers will be strictly construed,<sup>2</sup> and will be held to include those powers only which are expressly conferred or are necessarily to be implied.<sup>3</sup>

§ 523. **Ministerial Officer can not question Validity of Law requiring his Action.**—It is not within the scope of the duties of a ministerial officer to pass upon the validity of laws, instructions or proceedings *prima facie* valid, and requiring his action. His only duty in such a case is obedience, and, as will be seen hereafter,<sup>4</sup> he can not excuse himself by undertaking to show the unconstitutionality or other invalidity of the law, or the irregularity of the proceedings.<sup>5</sup>

§ 524. **Ministerial Officer can not act in his own Behalf.**—It is a principle of great importance, and quite general acceptance, that no officer shall act as such in a matter in which he is personally interested as a party. Hence it has frequently been held that a ministerial officer can not make a valid service of process in a cause to which he is a party.<sup>6</sup>

way of illustration merely. *Lewis v. Webb*, 8 Me. 326; *Lane v. Dorman*, 3 Scam. (Ill.) 242, (36 Am. Dec. 543); *Campbell v. Union Bank*, 6 How. (Miss.) 661; *Ervine's Appeal*, 16 Penn. St. 266, (55 Am. Dec. 499); *Cash*, Appellant, 6 Mich. 193; *McDaniel v. Correll*, 19 Ill. 226, (68 Am. Dec. 587); *Denny v. Mattoon*, 2 Allen (Mass.) 361, (79 Am. Dec. 784); *Budd v. State*, 3 Humph. (Tenn.) 483, (39 Am. Dec. 189); *Wally v. Kennedy*, 2 Yerg. (Tenn.) 554, (24 Am. Dec. 511); *Picquet*, Appellant, 5 Pick. (Mass.) 64."

<sup>1</sup> See *ante*, § 511.

<sup>2</sup> *Green v. Beeson*, 81 Ind. 7; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Yancey v. Hopkins*, 1 Munf. (Va.) 419; *Day Co. v. State*, 68 Tex. 526.

<sup>3</sup> *Vose v. Deane*, 7 Mass. 280.

<sup>4</sup> See *post*, § 523.

<sup>5</sup> *State v. Buchanan*, 24 W. Va. 363; *Waldron v. Lee*, 5 Pick. (Mass.) 323; *People v. Collins*, 7 Johns. (N. Y.) 549; *Smyth v. Titcomb*, 31 Me. 273.

<sup>6</sup> *Singletary v. Carter*, 1 Bailey (S. C.) 467, 21 Am. Dec. 480; *Morton v. Crane*, 39 Mich. 526; *Gage v. Graf-*

§ 525. **Presumption of Authority.**—It is a constant presumption, attending the execution of official authority, where a public officer has assumed as such to do any act which could be lawfully done only under the protection and by virtue of official power, that he was<sup>a</sup> authorized to do the act in the manner and under the circumstances existing and adopted in that case.<sup>1</sup>

### III.

#### AUTHORITY BY RATIFICATION.

##### 1. *In General.*

§ 526. **Authority may be conferred by Ratification.**—But the act or contract of a public officer or agent which shall be binding upon his principal, may be not only that which was previously expressly authorized, but also that which, from the subsequent acts or conduct of the principal, the law, for the protection of third persons who have relied thereon in good faith, will presume to have been previously authorized.

§ 527. **What is meant by Ratification.**—When it is brought to the knowledge of the principal in the transaction that a public officer or agent has, while assuming to act in that capacity, exceeded the powers lawfully conferred upon him, one of three courses may be pursued in reference to his act:—1. It may be expressly repudiated and disowned; 2. It may be expressly adopted and confirmed, or 3. No express action of any kind may be taken in reference to it, the intention of the principal being left to be determined from his subsequent acts and conduct, and this, as will be seen, may be such as to raise the legal presumption that the act has been adopted and confirmed.

fam, 11 Mass. 181; Woods v. Gilson, 17 Ill. 218; Filkins v. O'Sullivan, 79 Ill. 524; Boykin v. Edwards, 21 Ala. 261; Ford v. Dyer, 28 Miss. 248; Chambers v. Thomas, 8 A. K. Marsh. (Ky.) 586.

In New York, he may serve a summons, but not a warrant or execution. Bennet v. Fuller, 4 Johns. 486; Tuttle

v. Hunt, 2 Cow. 486; Putnam v. Man, 8 Wend. 208, 20 Am. Dec. 686

<sup>1</sup> Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 70; Rex v. Vereist, 8 Camp. 432; McGahey v. Alston, 2 M. & W. 206; Faulkner v. Johnson, 11 M. & W. 581; Doe v. Young, 8 Q. B. 63; McMahon v. Lennard, 6 H. L. Cas. 970.

This adoption and confirmation, whether made expressly or presumed from subsequent conduct, is the act here to be considered under the title of ratification.

## 2. *What Acts May be Ratified.*

§ 528. *In general.*—Repeating to some extent what has been said in another place,<sup>1</sup> it may be said that the power to ratify an act done for and in behalf of another, necessarily presupposes in that other the power to do the act himself, both in the first instance<sup>2</sup> and at the time of ratification;<sup>3</sup> it also presupposes the power in that other to have authorized the doing of the act in the first instance and also to authorize its doing at the time of ratification.<sup>4</sup> Hence—

§ 529. *The general Rule.*—It is, therefore, the general rule that one may ratify the previous unauthorized doing by another in his behalf, of any act and of that only which he might then and could still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done.<sup>5</sup>

§ 530. *Torts may be Ratified.*—It is immaterial whether the unauthorized act arises from a contract or is founded upon a tort. Whoever, with knowledge of the facts, adopts as his own or knowingly appropriates the benefits of a wrongful act which another has, without authority, assumed to do in his behalf, will be deemed to have assumed the responsibility of the act.<sup>6</sup>

§ 531. *Void Acts can not be ratified—Voidable Acts may be.*—An act which was absolutely void at the time it was done can not be ratified. If the principal himself could not lawfully

<sup>1</sup> See Mechem on Agency, § 110 *et seq.*

<sup>2</sup> Davis v. Lane, 10 N. H. 156.

<sup>3</sup> Cook v. Tullis, 18 Wall. (U. S.) 832.

<sup>4</sup> Post, § 540.

<sup>5</sup> Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; McCracken v. San Francisco, 16 Cal. 619; Brady v. Mayor, 16 How. (N. Y.) Pr. 432; O'Connor v. Arnold, 53 Ind. 205; Armitage v. Widoe, 36 Mich. 124;

Supervisors v. Arrighi, 54 Miss. 668; Taymouth v. Koehler, 35 Mich. 22; Clarke v. Lyon Co. 8 Nev. 188.

<sup>6</sup> Wilson v. Tuman, 6 Man. & G. 242; Morehouse v. Northrop, 83 Conn. 380, 89 Am. Dec. 211; Griswold v. Haven, 25 N. Y. 595, 83 Am. Dec. 380; Lee v. West, 47 Ga. 311; National Life Ins. Co. v. Minch, 58 N. Y. 144; Lane v. Black, 21 W. Va. 617; Tucker v. Jerria, 75 Me. 184.



have done the act, or if it could not lawfully have been done by any one, no subsequent ratification or confirmation can give it force or effect.<sup>1</sup> If, however, the act were voidable merely it can, of course, be rendered valid.

§ 532. *Illegal Acts can not be ratified.*—It is but a re-statement of the same rules to say that an act done in violation of law or in contravention of public policy, the performance of which could not lawfully be delegated to an agent, cannot be lawfully ratified.<sup>2</sup>

### 3. *Who May Ratify.*

§ 533. *In general.*—The act of ratification in the case of a public officer may involve the power of two distinct classes of principals,—1. The State or other public body in whose behalf the officer or agent assumed to act, or 2. A private individual, who, for his own purposes, has set the public officer in motion, as in the case of a suitor who has employed a sheriff to execute process. Cases of the first class fall most properly within the scope of this work, while those of the second belong more appropriately to a treatise on agency or master and servant. It is, however, the

*General Rule*, that whoever was capable of performing an act or entering into a contract which another, unauthorized, has assumed to perform or make for him as his agent, and who is still capable of performing or entering into it, is capable of ratifying that act or contract, thereby rendering it good from the beginning and the same as though he had originally authorized or made it.<sup>3</sup>

§ 534. *Corporations, private and municipal, may ratify.*—And this rule is as true in the case of a corporation, private or

<sup>1</sup> *Armitage v. Widoe*, 36 Mich. 124; *Chapman v. Lee*, 47 Ala. 143; *Day v. McAllister*, 15 Gray (Mass.) 433; *Workman v. Wright*, 33 Ohio St. 405; 31 Am. Rep. 546; *Decuir v. Lejeune*, 15 La. Ann. 569; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Bird v. Brown*, 4 Ex. 786.

<sup>2</sup> *State v. Matthias*, 1 Hill (S. C.) 87;

*Turner v. Phoenix Ins. Co.* 55 Mich. 287; *Harrison v. McHenry*, *supra*.

<sup>3</sup> *Wilson v. Dame*, 58 N. H. 393; *Williams v. Butler*, 35 Ill. 544; *Indianapolis, &c., R. R. Co. v. Morris*, 67 Ill. 295; *Pollock v. Cohen*, 23 Ohio St. 514; *Sentell v. Kennedy*, 29 La. Ann. 679; *McCracken v. San Francisco*, 16 Cal. 591.

municipal, as of an individual. An act not within the corporate powers of the corporation cannot be rendered operative by ratification,<sup>1</sup> but if the act were one which the corporation might lawfully have done or authorized in the first instance, its unauthorized performance, in its behalf, may be ratified in the same manner and with the like effect as by an individual.<sup>2</sup>

So, as in the case of an individual, it is not necessary that there should be a direct proceeding, with an express intention to ratify. It may be done indirectly, and by acts of recognition or acquiescence, or by acts inconsistent with repudiation or disapproval.<sup>3</sup>

§ 535. *State may ratify.*—So, within the same limits, a State or other greater governmental power may ratify the unauthorized acts of its officers and agents.<sup>4</sup> Thus it is said in a case<sup>5</sup> in Minnesota speaking of an unauthorized sale of public property by an agent of the State: "It was competent, however, for the State as principal to make it good by legislative enactment, adopting it as its own; for it could have authorized it in the first instance, and whatever it can do or direct to be done originally, it can subsequently and when done lawfully ratify and adopt

<sup>1</sup>Taymouth v. Koehler, 35 Mich. 22; Highway Commissioners v. Van Dusan, 40 Mich. 439; Supervisors v. Arrighi, 54 Mich. 668; Smith v. Newburgh, 77 N. Y. 130; Green v. Cape May, 41 N. J. L. 45; Hague v. Philadelphia, 48 Penn. St. 528; Bangor Boom Co. v. Whiting, 29 Me. 123.

<sup>2</sup>Kelsey v. National Bank, 69 Penn. St. 426; Fleckner v. U. S. Bank, 8 Wheat. (U. S.) 363; Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271; Peterson v. Mayor, 17 N. Y. 449; Baker v. Cotter, 45 Me. 236; Despatch Line v. Bellamy Mnf'g Co., 12 N. H. 205, 37 Am. Dec. 203; Whitewell v. Warner, 20 Vt. 425; City of Detroit v. Jackson, 1 Doug. (Mich.) 106; Church v. Sterling, 16 Conn. 383;

Planters' Bank v. Sharp, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470.

<sup>3</sup>Scott v. Methodist Church, 56 Mich. 528; Taymouth v. Koehler, 35 Mich. 22; Sherman v. Fitch, 98 Mass. 59; Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326; Arlington v. Peirce, 123 Mass. 270; Hoyt v. Thompson, 19 N. Y. 307; Scott v. Middletown, &c., R. R. Co. 86 N. Y. 200; Gold Mining Co. v. National Bank, 96 U. S. 640; Law v. Cross, 1 Black (U. S.) 533.

<sup>4</sup>State v. Torinus, 26 Minn. 1, 37 Am. Rep. 395; State v. Delafield, 8 Paige (N. Y.) 527; Day Land & Cattle Co. v. State, 68 Tex. 526; Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225, 41 Am. Dec. 549.

<sup>5</sup>State v. Torinus, 26 Minn. 1, 37 Am. Rep. 395.

with the same effect as though it had been properly done under a previous authority."

§ 536. *When Officer may ratify.*—An officer or agent cannot ratify his own unauthorized act;<sup>1</sup> nor can one of two joint agents ratify the act of his coagent;<sup>2</sup> but where the act, which when done by one agent was unauthorized, is within the general power of another agent of the same principal, the doing of the act by the first agent may be ratified by the second.<sup>3</sup> This doctrine is frequently applied to the ratification of the acts of subordinate agents by the superior agents of corporations.<sup>4</sup> So inasmuch as the public can only act through its officers and agents, it is only through its superior officers and representatives that the acts and contracts of its inferior officers and agents can be confirmed.

Ratification by an officer or agent depends upon certain facts which must affirmatively be made to appear: (1) The agent ratifying must have had general power to do himself the act which he ratifies.<sup>5</sup> (2) They must both be agents of the same

<sup>1</sup> *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Hotchin v. Kent*, 8 Mich. 526.

<sup>2</sup> *Penn. v. Evans*, 28 La. Ann. 576.

<sup>3</sup> *Mound City Mutual L. Ins. Co. v. Huth*, 49 Ala. 530; *Whitehead v. Wells*, 29 Ark. 99; *Dorsey v. Abrams*, 85 Penn. St. 299; *Palmer v. Cheney*, 35 Iowa 281.

<sup>4</sup> Thus see *Cairo & St. L. R. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Toledo. Wab. & West. R. R. Co. v. Rodriguez*, 47 Ill. 188, 95 Am. Dec. 484; *Toledo, &c., R. R. Co. v. Prince*, 50 Ill. 26; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 129; *Anglo-Californian Bank v. Mahoney Mining Co.* 5 Sawy. (U. S. C. C.) 255, a. c. 104. U. S. 192; *Sherman v. Fitch*, 98 Mass. 59; *Walworth Co. Bank v. Farmers' L. & T. Co.*, 16 Wis. 629; *Hoyt v. Thompson*, 19 N. Y. 207; *Darst v. Gale*, 83 Ill. 186; *First National Bank v. Kimberlands*, 16 W. Va. 555; *Burrill v. Nahant*

*Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *Wood v. Whelen*, 23 Ill. 155; *Chouteau v. Allen*, 70 Mo. 290; *Reichwald v. Commercial Hotel Co.* 106 Ill. 439; *Lyndenborough Glass Co. v. Mass. Glass Co.* 111 Mass. 815; *Olcott v. Tioga R. R. Co.* 27 N. Y. 546, 84 Am. Dec. 298; *Union Mutual Life Ins. Co. v. Masten*, 3 Fed. Rep. 881.

<sup>5</sup> Thus in *DeLafield v. State*, 2 Hill (N. Y.) 175, it is said: "The appellant relies on the fact that the governor, after he knew of the first contract, signed the bonds and caused them to be delivered; and that some of the other public officers of the State acted under the contracts, drawing for money and receiving payments. But the difficulty is that the governor was no more than an agent for the State, and he, as well as the commissioners, acted under a limited authority; and the same remark is applicable to the auditor and other

principal, and the agent whose act is in question must have professed to act as agent of the common principal.<sup>1</sup>

#### 4. *Conditions of Ratification.*

§ 537. *In general.*—The question of the conditions which must exist to effect a ratification so far as they affect a private agency have been considered in another place,<sup>2</sup> but as the same principles must, in general, apply to the case of a public agency, they may, perhaps, be properly recapitulated here.

§ 538. 1. *Principal must have been identified.*—The act to be ratified must have been done by one claiming to represent the person ratifying or persons of his description.<sup>3</sup> It is not necessary that the intended principal be known to the agent at the time, but it is necessary that the person for whom the agent professes to act must be a person who is then capable of being ascertained. Neither is it necessary that he should have been named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound.<sup>4</sup>

§ 539. 2. *Principal must have been in Existence.*—It follows necessarily from the doctrine of the preceding section that the principal must also have been in existence at the time the act to be ratified was done. A principal, *e. g.*, a corporation, subsequently coming into existence may become liable upon contracts assumed to have been made in its behalf before its organization by persons who undertook to bind it in advance, as where the corporation when organized, with knowledge of the facts, appropriates and retains the benefits of the contracts so made on its account; <sup>5</sup> but this liability is rather that of a new implied con-

public officers. None of them had authority to make such contracts as these were; and if they could not make them originally, they could not ratify them."

<sup>1</sup> *Ironwood Store Co. v. Harrison*, 75 Mich. 197, 43 N. W. Rep. 808.

<sup>2</sup> *Mechem on Agency*, § 124 *et seq.*

<sup>3</sup> *Posters v. Bates*, 12 M. & W. 226.

<sup>4</sup> *Watson v. Swann*, 11 O. B. (N.S.) 771; 102 Eng. Com. Law Rep. 770; *Kelner v. Baxter*, L. R. 3 C. P. 174.

<sup>5</sup> *Rockford, &c., R. R. Co. v. Sage*, 65 Ill. 323, 16 Am. Rep. 587; *Bell's Gap R. R. Co. v. Christy*, 79 Penn. St. 54, 21 Am. Rep. 89; *Paxton Cattle Co. v. First National Bank*, 21 Neb. 631, 59 Am. Rep. 852; *Western*

tract than the ratification of one which was made before the corporation had acquired a legal existence.<sup>1</sup>

§ 540. 3. **Principal must have present Ability.**—As has been seen, the power to ratify presupposes a present ability in the principal to do the act himself or to authorize it to be done.<sup>2</sup> If, therefore, for any reason, the principal has become, since the doing of the act to be ratified, incapable of doing the act himself and of authorizing it to be done, he is incapable of ratifying it.<sup>3</sup>

And so if third persons acquire rights after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to overreach and defeat those rights.<sup>4</sup>

§ 541. 4. **Act must have been done as Agent.**—The act ratified must also have been done by the assumed agent as agent and in behalf of the principal. If the act was done by him as principal and on his own account, it cannot thus be ratified.<sup>5</sup>

§ 542. 5. **Knowledge of material Facts.**—It is also the general rule, that, except in those cases where the principal intentionally assumes the responsibility without inquiry, or deliberately ratifies, having all the knowledge in respect to the act which he cares to have,<sup>6</sup> any ratification of an unauthorized

*Screw Co. v. Cousley*, 73 Ill. 581; *New York, &c., R. R. Co. v. Ketchum*, 27 Conn. 170.

<sup>1</sup> *Morawetz on Corporations*, § 548.

<sup>2</sup> *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96. "Ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able at the time to make the contract to which, by his ratification, he gives validity." FIELD, J., in *McCracken v. San Francisco*, 16 Cal. 591. See also *Grogan v. San Francisco*, 18 Cal. 590; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Davis v. Lane*, 10 N. H. 158.

<sup>3</sup> *Cook v. Tullis*, 18 Wall. (U. S.) 832.

<sup>4</sup> *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Stoddart's Case*, 4 Ct. of Cl. 511.

<sup>5</sup> *Collins v. Suau*, 7 Robt. (N. Y.) 623; *Hamlin v. Sears*, 82 N. Y. 327; *Pittsburgh, &c., R.R. Co. v. Gazzam*, 32 Penn. St. 840; *Collins v. Waggoner*, Breese (Ill.) 26; *Beveridge v. Rawson*, 51 Ill. 504; *Commercial Bank v. Jones*, 18 Tex. 811; *Grund v. Van Vleck*, 69 Ill. 479; *Harrison v. Mitchell*, 18 La. Ann. 260; *Roby v. Cossitt*, 78 Ill. 638; *Allred v. Bray*, 41 Mo. 484; *Vanderbilt v. Turnpike Co.* 2 N. Y. 479; *Brainerd v. Dunning*, 80 N. Y. 211.

<sup>6</sup> *Lewis v. Read*, 18 M. & W. 834; *Kelley v. Newburyport Horse R. R. Co.*, 141 Mass. 496; *Phosphate of*

contract, in order to be made effectual, and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were known to him.<sup>1</sup> It is not necessary, however, that he should also be informed of the legal effect of the facts. If he knows the facts, it is enough. But if the material facts were suppressed, or were unknown to him, except as the result

Lime Co. v. Green, L. R. 7 C. P. 43, 1 Eng. Rep. 98.

<sup>1</sup>Dickinson v. Conway, 12 Allen (Mass.) 491; Combs v. Scott, *Id.* 493; Owings v. Hull, 9 Pet. (U. S.) 607; Hardeman v. Ford, 12 Ga. 205; Mapp v. Phillips, 32 Ga. 72; Mathews v. Hamilton, 23 Ill. 470; Tidrick v. Rice, 18 Iowa 214; Dodge v. McDonnell, 14 Wis. 553; Fletcher v. Dysart, 9 B. Mon. (Ky.) 413; Woodbury v. Larned, 5 Minn. 339; Humphrey v. Havens, 12 *Id.* 298; Seymour v. Wyckoff, 10 N. Y. 213; Brass v. Worth, 40 Barb. (N. Y.) 648; Roach v. Coe, 1 E. D. Smith (N. Y.) 175; Pittsburgh, &c., R.R. Co. v. Gazzam, 32 Penn. St. 340; Dupont v. Wertheiman, 10 Cal. 354; Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235; Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385; Manning v. Gasharie, 27 Ind. 399; *Ætna* Ins. Co. v. N. W. Iron Co., 21 Wis. 458; McCants v. Bee, 1 McCord Ch. 383, 16 Am. Dec. 610; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Pennsylvania Steam Nav. Co. v. Dandridge, 8 Gill & John. (Md.) 248, 29 Am. Dec. 543; Bohart v. Oberne, 36 Kan. 284; Spooner v. Thompson, 48 Vt. 259; Reynolds v. Ferree, 86 Ill. 570; Adams Exp. Co. v. Trego, 85 Md. 47; Lester v. Kinne, 37 Conn. 9; Delaney v. Levi, 19 La. Ann. 251; Williams

v. Storm, 6 Cold. (Tenn.) 203; Miller v. Board of Education, 44 Cal. 166; Commercial Bank v. Jones, 18 Tex. 811; Bannon v. Warfield 42 Md. 23; Bosseau v. O'Brien, 4 Biss. (U. S. C. C.) 395; Union Gold Mine Co. v. Rocky Mt. Nat. Bank, 2 Col. 565; Bank of Owensboro v. Western Bank, 18 Bush. (Ky.) 526, 26 Am. Rep. 211; Meyer v. Baldwin, 53 Miss. 263; Kerr v. Sharp, 33 Ill. 199; Stein v. Kendall, 1 Ill. App. 103; Snow v. Grace, 29 Ark. 131; Turner v. Wilcox, 54 Ga. 593; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Baldwin v. Burrows, 47 N. Y. 212; Silverman v. Bush, 16 Ill. App. 437; Hovey v. Dover, 59 N. H. 522; Curry v. Hale, 15 W. Va. 369; Bell v. Cunningham, 3 Pet. (U. S.) 69; Pacific Rolling Mill Co. v. Dayton, 7 Sawyer, (U. S. C. C.) 67, 5 Fed. Rep. 852; Forrestier v. Bordman, 1 Story, (U. S. C. C.) 52; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Bennecke v. Ins. Co. 105 U. S. 355; Fuller v. Ellis, 39 Vt. 345, 94 Am. Dec. 327; Deihl v. Adams Ins. Co. 53 Penn. St. 443; Bevin v. Conn. Mut. L. Ins. Co. 23 Conn. 244; International Bank v. Ferris, 118 Ill. 465. But see Scott v. Middletown, &c., R. R. Co. 86 N. Y. 200, as to when knowledge will be presumed

of his intentional and deliberate act, the ratification will be invalid because founded upon mistake or fraud.<sup>1</sup> And the same rule applies to the settlement of the liability of the agent to his principal for his unauthorized act.<sup>2</sup>

§ 543. 6. **No Ratification of Part of Act.**—It is a fundamental rule that if the principal elects to ratify any part of the unauthorized act he must ratify the whole of it. He cannot avail himself of it so far as it is advantageous to him, and repudiate its obligations; and this rule applies not only when his ratification is express but also when it is implied.<sup>3</sup>

§ 544. 7. **Rights of other Party must be prejudiced.**—The acts claimed to effect a ratification must be of such a nature that the rights of the other party who has relied upon them will be prejudiced if a ratification has not taken place.<sup>4</sup>

<sup>1</sup>In a recent case in Massachusetts it is held that it is not necessary that the principal should have knowledge not only of all of the facts, but also of the legal effect of the facts, and that he should then, with a knowledge of both law and facts, have ratified the contract by some independent and substantive act. "It is sufficient," says ALLEN, J., "if a ratification is made with a full knowledge of all the material facts. Indeed, a rule somewhat less stringent may properly be laid down where one purposely shuts his eyes to means of information within his own possession and control, and ratifies an act deliberately, having all the knowledge in respect to it which he cares to have." In *Kelly v. Newburyport Horse R. R. Co.*, 141 Mass. 496, citing *Combs v. Scott*, 12 Allan (Mass.) 498; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 48, 1 Eng. Rep. 89.

<sup>2</sup>*Bank of Owensboro v. Western*

*Bank*, 18 Bush (Ky.) 526, 26 Am. Rep. 211; *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552.

<sup>3</sup>*McClure v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557; *Eberts v. Selover*, 44 Mich. 519, 38 Am. Rep. 278; *Rudassill v. Falls*, 92 N. C. 222; *Tasker v. Kenton Ins. Co.*, 59 N. H. 438; *Barhydt v. Clark*, 12 Ill. App. 646; *Southern Express Co. v. Palmer*, 48 Ga. 85; *Krider v. Western College*, 81 Iowa 547; *Crawford v. Barkley*, 18 Ala. 270; *Hodnett v. Tatum*, 9 Ga. 70; *Henderson v. Cummings*, 44 Ill. 325; *Elam v. Carruth*, 2 La. Ann. 275; *Widner v. Lane*, 14 Mich. 124; *Peninsular Bank v. Hanner*, *Id.* 208; *Coleman v. Stark*, 1 Oregon, 115; *Crans v. Hunter*, 28 N. Y. 389; *Ruffner v. Hewett*, 7 W. V. 585; *Mercier v. Copelan*, 78 Ga. 686; *Hutchings v. Ladd*, 16 Mich. 498.

<sup>4</sup>*Doughaday v. Crowell*, 11 N. J. Eq. 201.

*What Amounts to a Ratification.*

§ 545. **Written or unwritten—Express or implied.**—As has been seen and will hereafter be more clearly seen, the ratification of an unauthorized act is deemed to be equivalent to a prior authority to perform it; and as that prior authority may have been written or unwritten, express or implied, so this ratification may be effected in the same way.<sup>1</sup>

Where the facts are undisputed, the question whether or not they amount to a ratification, is one of law for the court; but in other cases the question of ratification or not becomes one of fact to be determined by the jury.<sup>2</sup>

*a. Express Ratification.*

§ 546. **General Rule.**—It is the general rule that the act of ratification must be of the same nature as that which would be required for conferring the authority in the first instance.<sup>3</sup> If, therefore, sealed authority was indispensable, sealed ratification must be shown; and if written authority was required, written ratification must appear.<sup>4</sup> So if the authority could only have been conferred by an act of the legislature<sup>5</sup> or the resolution of a common council,<sup>6</sup> or by any other formal means or proceedings, the act of ratification must, in general, be evidenced in the same way.<sup>7</sup>

<sup>1</sup> *Goss v. Stevens*, 82 Minn. 472; *Post*, Subd. *a* and *b*; *Taylor v. Conner*, 41 Miss. 722, 97 Am. Dec. 419.

<sup>2</sup> *Swartwout v. Evans*, 87 Ill. 448; *Trustees v. McCormick*, 41 Ill. 828; *Marine Co. v. Carver*, 43 Ill. 66; *Paul v. Berry*, 78 Ill. 158; *Henderson v. Cummings*, 44 Ill. 325.

<sup>3</sup> "A ratification of an act done by one assuming to be an agent relates back and is equivalent to a prior authority. When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance there can be no valid ratification except in the same manner." *PARKER, C. J.* in *Despatch Line v. Bellamy Mfg. Co.* 12 N. H. 205, 87 Am. Dec. 203.

<sup>4</sup> *Pollard v. Gibbs*, 55 Ga. 45; *Grove v. Hodges*, 55 Penn. St. 504; *Palmer v. Williams*, 24 Mich. 328; and cases cited in following section. Where a statute required that the authority of an agent to make contracts of suretyship should be in writing, a subsequent parol ratification was held insufficient. *Ragan v. Chenault*, 78 Ky. 545.

<sup>5</sup> See *State v. Delafield*, 8 Paige (N. Y.) 527; *State v. Torinus*, 26 Minn. 1, 37 Am. Rep. 395.

<sup>6</sup> *McCracken v. San Francisco*, 16 Cal. 591; *Piemental v. San Francisco*, 21 Cal. 351; *Cross v. Morristown*, 18 N. J. Eq. 305.

<sup>7</sup> *Peterson v. Mayor*, 17 N. Y. 449.



## b. Implied Ratification.

§ 547. **In general—Variety of Methods.**—But by far the most numerous class of cases is that in which the ratification was not express but is inferred from the acts and conduct of the parties.

The methods by which a ratification may be effected are as numerous and as various as the complex dealings of human life. It is impossible to state them all. But certain forms that have been judicially passed upon may be grouped, and instances be given which may furnish a rule for future cases.

§ 548. **By accepting Benefits.**—It is a rule of quite universal application that he who would avail himself of the advantages arising from the act of another in his behalf must also assume the responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act, he will not afterwards be heard to say that the act was unauthorized. One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act and takes it as his own with all its burdens as well as all its benefits. He may not take the benefits and reject the burdens, but he must either accept them or reject them as a whole.<sup>1</sup> But here, as in other cases, it is indispensable that the principal should have had full knowledge of the material facts, or that he should have intentionally accepted the benefits without inquiry. Otherwise the receipt and retention of the benefits of the unauthorized act, is no ratification of it.<sup>2</sup>

<sup>1</sup> *Ruggles v. Washington Co.* 9 Mo. 496; *Hastings v. Bangor House*, 18 Me. 436; *Low v. Conn. &c. R. R. Co.* 46 N. H. 284; *Reid v. Hibbard*, 6 Wis. 175; *Cushman v. Loker*, 2 Mass. 106; *Narragansett Bank v. Atlantic Co.* 8 Metc. (Mass.) 282; *Codwise v. Hacker*, 1 Cal. (N. Y.) 526; *Moss v. Rossie Co.* 5 Hill (N. Y.) 137; *Palmerton v. Huxford*, 4 Den. (N. Y.) 166; *Houghton v. Dodge*, 5 Bosw. (N. Y.) 326; *Farmers', &c. Bank v. Sherman*, 6 *Id.* 181; *State v. Perry, Wright* (Ohio) 662; *Davis v. Krum*, 12 Mo. App. 279; *Parish v. Reeve*, 63 Wis. 315; *Hauss v. Niblack*, 80 Ind.

407; *Rich v. State Natl. Bank*, 7 Neb. 201; *Fowler v. N. Y. Gold Exchange*, 67 N. Y. 188; *Snow v. Grace*, 29 Ark. 181; *State v. Smith*, 48 Vt. 266; *Dunn v. Hartford, &c. R. R. Co.* 43 Conn. 484; *Hurd v. Marple*, 2 Ill. App. 403; *Ely v. James*, 123 Mass. 36; *Aurora Agl. Soc. v. Paddock*, 80 Ill. 263; *Bacon v. Johnson*, 56 Mich. 183; *Eadie v. Ashbaugh*, 14 Iowa 519; *Mundorff v. Wickersham*, 63 Penn. St. 87, 3 Am. Rep. 531; *Waterson v. Rogers*, 21 Kans. 529.

<sup>2</sup> *Bohart v. Oberne*, 86 Kans. 284; *Schuts v. Jordan*, 83 Fed. Rep. 55; *Kelley v. Newburyport Horse R. R.*

§ 549. By bringing Suit based on Agent's Act.—One of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action at law based upon such act. Thus a demand made by an agent will be deemed to be ratified by the principal, if he brings an action founded upon such demand,<sup>1</sup> and ratification by a bank of its cashier's endorsement of a note is established by the fact that the bank prosecutes an action on the note in the name of the endorsee;<sup>2</sup> so if the principal appear in court and prosecute an action of attachment begun in his name by one assuming to act as his agent, he will be held to have ratified the act of such agent in signing his name to the attachment bond.<sup>3</sup> And where a vendor who has been defrauded in a sale of his goods made by an agent, proceeds to judgment against the vendee after being fully apprised of the fraud, he ratifies the sale.<sup>4</sup> And where an agent without authority had consigned his principal's goods for sale, and the principal brought an action against the agent for the price and value of the goods so consigned, it was held a *prima facie* ratification of the consignment,<sup>5</sup> and an action to enforce a contract made by an agent, is sufficient evidence of the agent's authority to make it.<sup>6</sup> And an action to recover upon a note taken in payment of goods sold by an agent, ratifies the sale, and with it, in cases where the agent would have authority to warrant, a warranty made by the agent as a part of the sale.<sup>7</sup> And bringing an action on a mortgage taken by an agent, ratifies his act in taking it.<sup>8</sup> So a principal's abandonment of a suit upon a

Co. 141 Mass. 496; *Combs v. Scott*, 12 Allen (Mass.) 493; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43, 1 Eng. Rep. 98, and cases cited in preceding note.

<sup>1</sup> *Ham v. Boody*, 20 N. H. 411, 51 Am. Dec. 235; *Payne v. Smith*, 12 N. H. 34; *Town of Grafton v. Folsombee*, 16 N. H. 450, 41 Am. Dec. 736.

<sup>2</sup> *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753.

<sup>3</sup> *Bank of Augusta v. Conrey*, 28 Miss. 667; *Dove v. Martin*, 23 Miss. 588.

<sup>4</sup> *Lloyd v. Brewster*, 4 Paige (N. Y.) 537; *Bank of Beloit v. Beale*, 34 N. Y. 473.

<sup>5</sup> *Frank v. Jenkins*, 22 Ohio St. 597.

<sup>6</sup> *Dodge v. Lambert*, 2 Bosw. (N. Y.) 570; *Benson v. Liggett*, 78 Ind. 452.

<sup>7</sup> *Franklin v. Ezell*, 1 Sneed (Tenn.) 497; *Cochran v. Chitwood*, 59 Ill. 53; *Smith v. Tracy*, 36 N. Y. 79.

<sup>8</sup> *Partridge v. White*, 59 Me. 564. And see *Beidman v. Goodell*, 56 Iowa 592; *Roberts v. Rumley*, 58 Iowa 301.

compromise of the cause of action by an agent ratifies the compromise.<sup>1</sup>

§ 550. **Ratification by Acquiescence—Silence.**—It is a maxim of the law that he who remains silent when in conscience he ought to speak, will be debarred from speaking when in conscience he ought to remain silent, and this rule is of frequent application in determining whether or not an alleged principal has set the seal of his sanction upon a transaction assumed to have been done in his behalf.

§ 551. **Same Subject—Election.**—A principal upon being informed of the unauthorized act of another in his behalf, has the right to elect whether he will ratify or repudiate the act.<sup>2</sup> And this right of election belongs in the first instance to him alone, and so long as the condition of all parties remains unchanged, he cannot be prevented from ratifying because the other party may, for any reason, prefer to treat the act as invalid.<sup>3</sup> And even though at first he may disapprove, he may afterwards, if the condition of all parties remains unchanged, elect to give confirmation to the act.<sup>4</sup>

§ 552. **Same Subject—Must elect within a reasonable Time.**—But where the rights and obligations of third persons may depend on his election, it is obvious that he is bound to act or suffer the necessary consequences of inaction, and that if, after knowledge, he remains entirely passive in regard to the transaction, it is but just, when the protection of third persons may require it, to presume that what upon knowledge he has failed to repudiate, he has at least tacitly confirmed.<sup>5</sup> If therefore he would escape responsibility for the act, he must give notice of his non-concurrence. The time within which this notice is to be given has not been settled with absolute harmony by the courts. Many cases hold that the principal is bound to act at once upon receiving knowledge,<sup>6</sup> but the better rule and the one supported by the

<sup>1</sup> *Holt v. Cooper*, 41 N. H. 111.

<sup>2</sup> *Andrews v. Ætna L. Ins. Co.* 92 N. Y. 506.

<sup>3</sup> *Idem.* But see *post*, § 562.

<sup>4</sup> *Woodward v. Harlow*, 28 Vt. 388.

<sup>5</sup> *Saveland v. Green*, 40 Wis. 431.

<sup>6</sup> *Ward v. Williams*, 26 Ill. 447, 79

Am. Dec. 385; *Johnston v. Berry*, 8

Ill. App. 256; *Pitts v. Shubert*, 11 La.

286, 30 Am. Dec. 718; *Kehlor v.*

*Kemble*, 26 La. Ann. 713; *Foster v.*

*Rockwell*, 104 Mass. 167; *Crane v.*

*Bedwell*, 25 Miss. 507; *Bredin v. Du-*

*barry*, 14 Serg. & R. (Penn.) 37; *Ker-*

majority of the authorities, is, that if the principal desires to repudiate the transaction he must give notice thereof within a reasonable time after becoming fully informed; and that if he does not so dissent his silence will afford conclusive evidence of his approval.<sup>1</sup> What shall be deemed to be a reasonable time depends in this case as in others upon the situation of the parties and the facts and circumstances of the case.<sup>2</sup>

§ 553. Same Rule applies to private Corporations.—And, as has been seen, these rules apply as well to corporations within the scope of their corporate powers as to individuals.<sup>3</sup>

"It seems to be now well settled," says Chief Justice SHAW, "since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions from the largest to the minutest and affect almost every individual in the community, are affected like private persons with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents;

see *v. National Bank of Crawford Co.* 69 Penn. St. 426; *Williams v. Storm*, 6 Cold. (Tenn.) 208; *Fort v. Coker*, 11 Heisk. (Tenn.) 579; *Hart v. Dixon*, 5 Lea (Tenn.) 336; *Meister v. Cleveland Dryer Co.* 11 Ill. App. 227.

<sup>1</sup> *Saveland v. Green*, 40 Wis. 431; *Heyn v. O'Hagen*, 60 Mich. 157; *Mobile & Montgomery Ry. Co. v. Jay*, 65 Ala. 118; *Miller v. Excelsior Stone Co.* 1 Ill. App. 278; *Hamlin v. Sears*, 82 N. Y. 327; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Wright v. Boynton*, 37 N. H. 9; *Gold Mining Co. v. National Bank*, 96 U. S. 640; *Parish v. Reeve*, 63 Wis. 315; *Alexander v. Jones*, 64 Iowa, 207; *Laffite v. Godchaux*, 35 La. Ann. 1161; *Breed v. Central City Bank*, 6 Col. 235; *Gold Mining Co. v. Rocky Mt. Nat. Bank*, 2 Col. 565; *Law v. Cross*, 1 Black (U. S.) 583; *Norris v. Cook*, 1 Curt. (U. S. C.C.) 464; *Abbe v. Rood*, 6 McLean (U.

S.C.C.) 106; *Brigham v. Peters*, 1 Gray (Mass.) 189; *Lorie v. North Chicago City Ry. Co.* 32 Fed. Rep. 270; *Bray v. Gunn*, 58 Ga. 144; *Oliver v. Johnson*, 24 La. Ann. 460; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Clay v. Spratt*, 7 Bush (Ky.) 834; *Cooper v. Schwartz*, 40 Wis. 54; *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 179; *Connett v. Chicago*, 114 Ill. 238; *Booth v. Wiley*, 102 Ill. 84; *Johnston v. Wingate*, 29 Me. 404; *Farwell v. Howard*, 26 Iowa 381; *International Bank v. Ferris*, 118 Ill. 465.

<sup>2</sup> *McDermid v. Cotton*, 2 Ill. App. 297; *Philadelphia, &c. R. R. Co. v. Cowell*, 28 Penn. St. 329, 70 Am. Dec. 128; *Reese v. Medlock*, *supra*.

<sup>3</sup> *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Co.*, 90 N. Y. 607; *Kelsey v. National Bank of Crawford Co.*, 69 Penn. St. 426.

and generally by those legal and equitable considerations which affect the rights of natural persons.”<sup>1</sup>

§ 554. **And to Municipal and Quasi-Municipal Corporations.**—The same rules apply also to municipal and *quasi*-municipal corporations,<sup>2</sup> although, from their nature, a ratification by acquiescence is not so readily to be inferred as in the case of individuals or of private corporations. The numbers composing the municipal corporation being large and their direct participation in municipal affairs being less, the evidence of ratification, where it is based upon acquiescence, must manifestly be sufficient to show the approval of the corporation as such. It cannot be based alone upon the acquiescence of unofficial individuals who have no authority to act for or bind the entire body.<sup>3</sup>

But here also must be kept in mind a point already considered, that those acts only can be ratified which might originally have been authorized, for if the act in question was one not within the corporate powers of the municipality, no subsequent acquiescence or approval could give it validity.<sup>4</sup>

<sup>1</sup> *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59. “The law is well settled that a principal who neglects promptly to disavow an act of his agent by which the latter has transcended his authority, makes the act his own; and the maxim which makes ratification equivalent to a precedent authority, is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent.” WILLIAMS, J., in *Kelsey v. National Bank*, *supra*.

<sup>2</sup> For illustrations of ratification by acquiescence by municipal corporations, see *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721; *Hasbrouck v. Milwaukee*, 13 Wis. 48; *Supervisors v. Schenck*, 5 Wall. (U. S.) 782; *People v. Swift*, 31 Cal. 26; *Clarke v. Lyon County*, 8 Nev. 181; *Crawshaw v. Roxbury*, 7 Gray (Mass.) 374; *Pet-*

*erson v. Mayor*, 17 N. Y. 449; *Backman v. Charlestown*, 42 N. H. 125; *Harris v. School District*, 28 N. H. 65; *Wilson v. School District*, 32 N. H. 118.

<sup>3</sup> *School District v. Ætna Ins. Co.*, 62 Me. 380; *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517; *Davis v. School District*, 24 Me. 349; *White v. Sanders*, 32 Me. 188; *Fisher v. School District*, 4 Cush. (Mass.) 494; *Bliss v. Clark*, 16 Gray (Mass.) 60; *Wilson v. School District*, 32 N. H. 118.

<sup>4</sup> *Highway Commissioners v. Van Dusan*, 40 Mich. 429; *Taymouth v. Koehler*, 35 Mich. 22; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 876; *Horton v. Town of Thompson*, 71 N. Y. 513; *McCracken v. San Francisco*, 16 Cal. 591; *Ashbury, &c. Co. v. Riche*, L.R. 7 H. L. 653, 14 Eng. Rep. 42; *Jefferson County v. Arrighi*, 54 Miss. 668; *Nash v. St. Paul*, 11 Minn. 174; *Green v. Cape May*, 41 N. J. L. 45; *Smith*

§ 555. *How in Case of a State.*—The limitations applicable in the case of a municipal corporation operate with still greater force in the case of a State. As has been said, “a State cannot act in the same form, nor with the same promptitude as an individual.”<sup>1</sup> Where the ratification of the act requires an act of the legislature, a year or two may often intervene before that body will be in session. And in no case can the same degree of promptness be expected of the State that would be required of an individual. Nor, as a general rule, can the State lose anything by the non-action or laches of its office.<sup>2</sup>

### 6. *The Results of Ratification.*

§ 556. *What for this Subdivision.*—The question of the results which flow from the ratification of an unauthorized act is obviously one of the most important connected with the subject. This question has been considered in another place,<sup>3</sup> but a brief résumé of the subject seems appropriate here also.

It is obvious that there are several parties whose rights and obligations may be affected by a ratification, and the question will be considered,—I. In general. II. As between principal and the officer. III. As between the principal and the other party. IV. As between the officer and the other party.

#### 1. In General.

§ 557. *Equivalent to precedent Authority.*—By ratifying the unauthorized act the principal assumes and adopts it as his own, and this adoption extends to the whole of the act,—it goes back to its inception and continues to its legitimate end. Subject therefore to an exception to be noticed in the following section, it is the universal rule that as against the principal the ratification is retroactive and equivalent to a prior authority,<sup>4</sup> or to use

<sup>1</sup> Newburgh, 77 N. Y. 180; Peterson v. Mayor, 17 N. Y. 449; Reilly v. Philadelphia, 60 Penn. St. 467.

<sup>2</sup> Delafield v. State, 2 Hill (N. Y.) 176.

<sup>3</sup> Lake Shore, &c. Ry. v. People, 46 Mich. 198; Detroit v. Weber, 26 Mich. 284; Attorney-General v. Supervisors, 30 Mich. 388.

<sup>4</sup> See Mechem on Agency, § 166, et seq.

<sup>5</sup> Fleckner v. Bank of U. S., 8 Wheat. (U. S.) 838; Cook v. Tullis, 18 Wall. (U. S.) 832; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Cleland v. Walker, 11 Ala. 1058, 46 Am. Dec. 238; McMahan v. McMahan, 13 Penn. St. 376,

the language of a distinguished writer and judge, "No maxim is better settled in reason and law than the maxim *omnis ratio habitio retrotrahitur, et mandato priori equiparatur*; at all events where it does not prejudice the rights of strangers."<sup>1</sup>

"The ratification operates upon the act ratified precisely as though the authority to do the act had been previously given, except where the rights of third parties had intervened between the act and the ratification."<sup>2</sup> And this rule applies as well to corporations as to individuals.<sup>3</sup>

It has been seen also, that the principal cannot avail himself of the benefits of the act and repudiate its obligations.<sup>4</sup> Having with full knowledge of all the material facts ratified, either expressly or impliedly, the act assumed to be done in his behalf, he thenceforward stands responsible for the whole of it to the full extent to which the agent assumed to act, and he must abide by it whether the act be a contract or a tort,<sup>5</sup> and whether it results to his advantage or detriment.<sup>6</sup>

§ 558. **Exception—Intervening Rights can not be defeated.**—But this general rule is subject to one exception, which is that the intervening rights of third persons cannot be defeated by the ratification. If prior to the ratification the principal has put it out of his power to perform the contract ratified, by conveying the subject-matter thereof to a third person who took the

53 Am. Dec. 481; *Pearsons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85; *Wood v. McCain*, 7 Ala. 800, 43 Am. Dec. 612; *Planter's Bank v. Sharp*, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470; *Starks v. Sikes*, 8 Gray (Mass.) 509, 69 Am. Dec. 270; *Goss v. Stevens*, 33 Minn. 472; *United States Express Co. v. Rawson*, 106 Ind. 215; *Bronson v. Chappell*, 12 Wall (U. S.) 681; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Lowry v. Harris*, 12 Minn. 255; *Hankins v. Baker*, 46 N. Y. 666; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690; *Louisville, &c., Ry. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770.

<sup>1</sup> STORY, J., in *Fleckner v. Bank*, *supra*.

<sup>2</sup> FIELD, J., in *Cook v. Tullis*, *supra*.

<sup>3</sup> *Planters' Bank v. Sharp*, *supra*; *Despatch Line v. Bellamy Mfg. Co.* *supra*, *Leggett v. N. J. Mfg. and Banking Co.*, 1 Saxt. Ch. (N. J.) 541, 23 Am. Dec. 728; *Frankfort S.T. Co. v. Churchill*, 6 T. B. Monroe (Ky.) 427, 17 Am. Dec. 159; *Everett v. United States*, 6 Port. (Ala.) 166; 30 Am. Dec. 584.

<sup>4</sup> *Ante*, § 542.

<sup>5</sup> *Cooley on Torts*, 127.

<sup>6</sup> *Wood v. McCain*, and cases cited in note 4, p. 361.

same in good faith,' or if third parties have in good faith acquired an estate, or interest in, or a lien or claim upon the subject-matter by attachment,<sup>8</sup> judgment or otherwise, these rights cannot be cut off at the mere volition of the principal.<sup>9</sup> Nor will the principal by ratifying be permitted to impose substantial duties or obligations upon third persons which would not exist if ratification had not taken place.

§ 559. **Ratification irrevocable.**—As has been seen, the principal upon being fully informed of the unauthorized act of one assuming to be his agent has the right to elect whether he will ratify such act or not; but when he has once exercised this right the election is final. If therefore he adopts the act, even for a moment, he adopts it forever, and he will not be allowed, at least where the rights of other parties may be affected thereby, to revoke his ratification.<sup>4</sup>

## 2. As between Principal and Officer.

§ 560. **Ratification releases Officer from Liability to Principal.**—It is the general rule that by ratifying the unauthorized act the principal absolves the agent from all responsibility for loss or damage growing out of the unauthorized transaction.<sup>6</sup> Here, as in other cases, the ratification must have been made with full

<sup>1</sup> *McCracken v. City of San Francisco*, 16 Cal. 624.

<sup>2</sup> *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Taylor v. Robinson*, 14 Cal. 396.

<sup>3</sup> *Cook v. Tullis*, 18 Wall. (U. S.) 832; *McMahan v. McMahan*, 18 Penn. St. 376, 53 Am. Dec. 481; *Stoddard's Case*, 4 Ct. of Cl. 511; *Pollock v. Cohen*, 32 Ohio St. 514.

<sup>4</sup> *Jones v. Atkinson*, 68 Ala. 167; *Smith v. Cologan*, 2 T. R. 189; *Clarke v. Van Reimsdyk*, 9 Cranch (U. S. C. C.) 153; *Hazelton v. Batchelder*, 44 N. Y. 40; *Brock v. Jones*, 16 Tex. 461; *Beall v. January*, 62 Mo. 484.

<sup>5</sup> *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552; *Courcier v. Ritter*, 4 Wash. C. C. 549; *Cairnes v. Bleecker*,

12 Johns. (N. Y.) 800; *Pickett v. Pearsons*, 17 Vt. 470; *Hanks v. Drake*, 49 Barb. (N. Y.) 202; *Vianna v. Barclay*, 3 Cow. (N. Y.) 238; *Towle v. Stevenson*, 1 Johns. (N. Y.) Cas. 110; *Ward v. Warfield*, 3 La. Ann. 471; *Flower v. Downs*, 6 Id. 538; *Oliver v. Johnson*, 24 Id. 460; *Hazard v. Spears*, 4 Keyes (N. Y.) 485; *Woodward v. Suydam*, 11 Ohio 360; *Green v. Clark*, 5 Denio (N. Y.) 503; *Skinner v. Dayton*, 19 Johns. (N. Y.) 518, 10 Am. Dec. 286; *Bray v. Gunn*, 53 Ga. 144; *Foster v. Rockwell*, 104 Mass. 172; *Clay v. Spratt*, 7 Bush (Ky.) 385; *Bank of St. Mary's v. Calder*, 3 Strob. (S. C.) 403; *Ætna Ins. Co. v. Sabine*, 6 McLean (U. S. C. C.) 393.



knowledge of all the material facts, and if the agent has kept back or suppressed any such facts, the ratification of the principal made in ignorance of them is no defense to the agent.<sup>1</sup> And even if the agent communicate to his principal all the facts known to him at the time, but if afterwards it turns out that the facts so communicated were not the real facts of the case, the agent is not relieved by a ratification made under such a misapprehension,<sup>2</sup> although the facts and circumstances may have been innocently concealed or inadvertently misrepresented.<sup>3</sup> In such a case the assumed condition is not that claimed to have been ratified.

### 3. As between Principal and the other Party.

§ 561. *a. Other Party against Principal.*—As soon as the unauthorized act is ratified, the principal who before was only nominally a party to the transaction, becomes in reality the party responsible. From this time on he is subject to all the obligations that pertain to the transaction in the same manner and to the same extent that he would be had the act been done originally by him in person, or by his express authority. The other party therefore may demand and enforce on the part of the principal the full performance of the contract entered into by his agent.<sup>4</sup> And if the act or contract of the agent was tainted or procured by fraud, the principal by ratification assumes responsibility for the fraud.<sup>5</sup>

§ 562. *b. Principal against the other Party.*—Where, however, the principal attempts, by means of a subsequent ratification, to build up affirmative rights against the other party, different considerations apply. As a rule the obligations of a contract must be mutual,—both parties must be bound or neither. Hence if the contract made by the agent was not binding upon the principal because of the agent's want of authority, the contract lacks

<sup>1</sup> Bell v. Cunningham, 3 Pet. (U.S.) 69, and cases last cited; Bank of Owensboro v. Western Bank, 3 Bush (Ky.) 526, 26 Am. Rep. 211.

<sup>2</sup> Bank of Owensboro v. Western Bank, *supra*.

<sup>3</sup> Vincent v. Rather, 31 Tex. 77, 93 Am. Dec. 516.

<sup>4</sup> See cases cited in § 557, *ante*.

<sup>5</sup> National Life Ins. Co. v. Minch, 53 N. Y. 144; Elwell v. Chamberlin, 81 N. Y. 611; Smith v. Tracy, 36 N. Y. 79; Lane v. Black, 21 W. Va. 617.

this element of mutuality, and the principal not being bound the other party is free also.

The principal, however, as has been seen, may by his subsequent affirmance become bound by the contract, but it is obvious that unless the other party has expressly agreed to that effect, it cannot rest with the principal alone to bind the other party also to the contract. That can be done only by some act on the part of the other party signifying his present consent to be bound. His attempt to enforce the contract against the principal upon the basis of the latter's affirmance of it, or his acceptance of the principal's performance of it, would be such an act, and, as in the case of the principal, if he elects to avail himself of the benefits, he must also assume the obligations.

The principal, therefore, when the other party thus evinces his affirmance of the contract, is invested with all the rights against such other party which the contract confers, and may enforce its performance in the same manner as though it had been originally made with him in person.<sup>1</sup> But in the absence of this affirmance by the other party, the principal cannot, while the contract remains purely executory, by his affirmance alone, create obligations in his behalf against the other party.<sup>2</sup>

#### 4. As between Officer and other Party.

§ 563. **Ratification releases Officer on Contract.**—Where the contract has been made in the name and on behalf of the alleged principal, and the latter, with full knowledge of the facts, has ratified it, the contract then becomes in fact, so far as the rights of the other party are concerned, what at first it only assumed to be,—the contract of the principal. The other party has then what he contracted for,—the liability and responsibility of the principal; and he can obviously suffer no injury from the fact that the agent's act was originally unauthorized. The agent or officer, therefore, drops out of sight. His identity is thereafter merged in that of the principal and he cannot personally

<sup>1</sup> *State v. Torinus*, 26 Minn. 1, 37 Am. Rep. 395; *Soames v. Spencer*, 1 Dowl. & R. 33; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490;

*Day Land & Cattle Co. v. State*, 68 Tex. 526.

<sup>2</sup> *Dodge v. Hopkins*, 14 Wis. 630; *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 108.

call upon the other party for performance, nor can performance, be demanded of him. He cannot sue in his own right, nor can he be rendered personally liable upon the ground of the failure of an assumed authority.<sup>1</sup>

§ 564. *Otherwise in Tort.*—But while, by ratifying the tort committed by his agent the principal becomes liable therefore, this is an additional liability and not a substituted one. The agent still remains liable to third persons and satisfaction may be demanded either of the principal or of the agent or of both. It is no defence to one who is sued for committing a trespass to reply that he acted as agent of another.<sup>2</sup>

But a distinction is made in this respect in the case of a public officer. Thus, it is said by PARKE, B., in a leading case:<sup>3</sup> "If an individual ratifies an act done in his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of state without remedy except by appeal to the justice of the state which inflicts it, or by the application of the individual suffering to the government of his country to insist upon compensation from the government of this—in either view the wrong is no longer actionable."

<sup>1</sup> See *East India Co. v. Hensley*, 1 Esp. 112; *Polhill v. Walter*, 3 B. & Ad. 114; *Bowen v. Morris*, 2 Taunt. 374.

<sup>2</sup> *Stephens v. Elwall*, 4 M. & S. 259; *Permynter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177; *Josselyn v. McAllis-*

*ter*, 22 Mich. 300; *Wright v. Eaton*, 7 Wis. 595; *Thorp v. Burling*, 11 Johns. (N. Y.) 235; *Richardson v. Kimball*, 28 Me. 463; *Burnap v. March*, 13 Ill. 535.

<sup>3</sup> *Buron v. Denman*, 2 Ex. 167.

## CHAPTER II.

### OF THE EXECUTION OF THE AUTHORITY.

§ 565. Purpose of this Chapter.

#### I. THE NECESSITY OF PERSONAL EXECUTION.

- 566. An Office cannot be held in Trust.
- 567. Judgment and Discretion can not be delegated.
- 568. Mechanical or ministerial Duties may be delegated.
- 569. Authority to appoint Deputies.
- 570. Authority of Deputies.

#### II. OF THE EXECUTION OF A JOINT AUTHORITY.

- 571. Private Trust or Agency must be executed by all.
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- 574. Same Subject—Where no Majority possible all must act.
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- 578. Same Subject—All may ratify Act of Part.
- 579. Presumption of due Execution.
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#### III. IN WHOSE NAME AUTHORITY SHOULD BE EXERCISED.

- 582. Public officer acts in Name of State.
- 583. Should not make Contracts or transact Business for Public in his own Name.
- 584. In whose Name Deputy should act.

§ 565. Purpose of Chapter.—In discussing the question of proper execution of the authority, a number of considerations must be regarded. Thus, 1. The necessity of personal execution. 2. The execution by two or more officers. 3. In whose name authority is to be executed.

## I.

## THE NECESSITY OF PERSONAL EXECUTION.

§ 566. **An Office can not be held in Trust.**—It is the presumption of the law that a public office is to be held and executed by the person appointed or elected to it, and it is opposed to the policy of the law to permit an office to be held by one ostensibly as the real officer, but in secret trust for another.<sup>1</sup>

§ 567. **Judgment and Discretion can not be delegated.**—It is a well settled rule, in the case of private agents, that where the execution of the trust requires, upon the part of the agent, the exercise of judgment or discretion, its performance can not, in the absence of express or implied authority, be delegated to another.<sup>2</sup> In such cases it is presumed that the agent was selected because his principal desired and relied upon the agent's personal judgment and discretion, and, unless authority to delegate it be expressly or impliedly given, the agent can not entrust the performance to another to whom the principal may be, perhaps, a stranger, and in whom he might not be willing to confide.<sup>3</sup>

This rule applies also to public officers. In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he can not delegate his duties to another.<sup>4</sup>

The applicability of the principle would be obvious in the case of judges of courts, who clearly could not be permitted to delegate or farm out their judicial duties to others,<sup>5</sup> but it applies as well to all cases in which judicial and discretionary

<sup>1</sup> Garforth v. Fearon, 1 H. Bl. 327.

<sup>2</sup> Mechem on Agency, §§ 184-197.

<sup>3</sup> For a full discussion of the subject, see Mechem on Agency, Book I, Chap. VI.

<sup>4</sup> State v. Paterson, 34 N. J. L. 163; Sheehan v. Gleeson 46 Mo. 100; Abrams v. Ervin, 9 Iowa, 27; Lewis v. Lewis, 9 Mo. 183, 43 Am. Dec. 540.

<sup>5</sup> See VanSlyke v. Insurance Co., 39 Wis. 390, 20 Am. Rep. 50.

power is to be exercised. Thus the power to fix and to admit to bail is a judicial one which can not be delegated.<sup>1</sup>

It is also frequently invoked in the case of municipal boards and officers. Wherever these boards and officers are vested with discretion and judgment, to be exercised in behalf of the public, the board or officer must exercise it in person and can not, unless expressly or impliedly authorized to do so, delegate it to others.<sup>2</sup>

Thus a common council charged with the duty of exercising its judgment and discretion in that respect, can not delegate to an officer, committee or other person the right and power to decide upon the time and manner of constructing side walks,<sup>3</sup> or of grading or paving streets,<sup>4</sup> or of regulating and licensing hacks,<sup>5</sup> or of regulating wharves and fixing the rate of wharfage,<sup>6</sup> or of constructing and repairing a pier and regulating the tolls thereon,<sup>7</sup> or of deciding upon and purchasing a school or market site,<sup>8</sup> or of controlling a public market and renting the stalls therein.<sup>9</sup>

So a board of supervisors cannot delegate their power and duty of regulating the bridging of public streams,<sup>10</sup> or of deter-

<sup>1</sup> *Jacquemine v. State*, 48 Miss. 280; *State v. Clark*, 15 Ohio, 595; *Morrow v. State*, 5 Kans. 563.

<sup>2</sup> *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385; *Hydes v. Joyes*, 4 Bush (Ky.) 464, 96 Am. Dec. 311; *State v. Hauser*, 68 Ind. 155; *State v. Bell*, 84 Ohio St. 194; *Brooklyn v. Breslin* 57 N. Y. 591; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Clark v. Washington*, 13 Wheat. (U. S.) 54; *Davis v. Read*, 65 N. Y. 566; *Supervisors v. Brush*, 77 Ill. 59; *Thompson v. Boonville*, 61 Mo. 282; *State v. Fiske*, 9 R. I. 94; *State v. Paterson*, 84 N. J. L. 168; *Oakland v. Carpenter*, 13 Cal. 540; *Whyte v. Nashville*, 2 Swan. (Tenn.) 364; *Lord v. Oconto*, 47 Wis. 386;

*Lauenstein v. Fond du Lac*, 28 Wis. 336; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396; *Ruggles v. Collier*, 43 Mo. 853; *Meuser v. Risdon*, 86 Cal. 239; *Darling v. St. Paul*, 19 Minn. 339; *St. Louis v. Clemens*, 43 Mo. 395, s. o. 52 Mo. 133.

<sup>3</sup> *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105.

<sup>4</sup> *Thompson v. City of Boonville*, 61 Mo. 282; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385.

<sup>5</sup> *State v. Fiske*, 9 R. I. 94.

<sup>6</sup> *Matthews v. City of Alexandria*, 68 Mo. 115, 30 Am. Rep. 776.

<sup>7</sup> *Lord v. Oconto*, 47 Wis. 386.

<sup>8</sup> *Lauenstein v. Fond du Lac*, 28 Wis. 336; *State v. Paterson*, 84 N. J. L. 167.

<sup>9</sup> *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

<sup>10</sup> *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453.

mining upon the conditions precedent to a county subscription.<sup>1</sup>

§ 568. **Mechanical or ministerial Duties may be delegated.**—Where, however, the question arises in regard to an act which is of a purely mechanical, ministerial or executive nature, a different rule applies.<sup>2</sup> It can ordinarily make no difference to any one by whom the mere physical act is performed when its performance has been guided by the judgment or discretion of the person chosen. The rule, therefore, is that the performance of duties of this nature may, unless expressly prohibited, be properly delegated to another.<sup>3</sup>

Where, however, the law expressly requires the act to be performed by the officer in person it can not, though ministerial, be delegated to another.<sup>4</sup>

§ 569. **Authority to appoint Deputies.**—Authority to appoint deputies is expressly conferred by statute upon a great variety of public officers, and the qualifications, powers and duties of such deputies are usually prescribed by the same statutes.

But in the absence of such express power, the question arises: When will the authority to appoint deputies be implied? This question, it will be observed, is substantially the same as that discussed in the previous sections. The rules prevailing at common law cannot, perhaps, be better stated than in the language of Bacon's Abridgement.<sup>5</sup>

"As to the execution of an office by deputy, we must observe that there are some offices which in their nature and constitution imply a power or right of exercising them by deputy; some that in their nature cannot be exercised by deputy; and some that by having such a power annexed to the grant or institution may be

<sup>1</sup> *Supervisors v. Brush*, 77 Ill. 59.

<sup>2</sup> See, in the case of private agents, *Mechem on Agency*, § 193.

<sup>3</sup> *Abrams v. Ervin*, 9 Iowa 87; *Edwards v. Watertown*, 24 Hun (N. Y.) 428, s. c. 61 How. Pr. 488; *Lewis v. Lewis*, 9 Mo. 183, 48 Am. Dec. 540.

<sup>4</sup> Under a statute providing that "When the signature of a person is required, he must write it or make his mark," a return of a constable

signed by another in his presence and by his express direction is not good, *Chapman v. Limerick*, 56 Me. 890. Though the court admit that such a signature might bind the principal of a private agent. See *Mechem on Agency*, § 96.

<sup>5</sup> The quotation here is made from the first American from the sixth London edition; 1813. Vol. V. tit. Offices and Officers, p. 306, sub. L.

so exercised, though without such an express provision they could not.

Offices of inheritance, for years, and those which require only a superintendency and no particular skill, may regularly be exercised by deputy; such as that of earl-marshal of England, forester, park-keeper, etc.

A sheriff, though he is an officer made by the king's letters patent, and though it be not said that he may execute his office *per se vel sufficientem deputatum suum*, yet he may make a deputy,<sup>1</sup> which is the under sheriff, against whom actions may be brought by the parties grieved.

And it is said in general that when an officer hath power to make assigns, he may implicitly make a deputy.

A judicial officer cannot, it is said, make a deputy, unless he hath a clause in his patent to enable him; because his judgment is relied on in matters relating to his office, which might be the reason of making the grant to him; neither can a ministerial officer depute one in his stead, if the office be to be performed by him in person; but when nothing is required but a superintendency in the office, he may make a deputy.

It is clear that the judges of Westminster Hall, as well as all others having judicial authority, must hold their courts in their proper persons, and cannot act by deputy, nor in any way transfer their power to another.

A coroner cannot make a deputy, nor an escheator; because these are judicial offices which they must exercise in person; but it is said that the king by special commission may appoint a deputy escheator to inquire by office of the death of a nobleman, or, as the book seems to hold, of any other person though under that degree.

It is held that the office of constable, being wholly ministerial and no way judicial, he may appoint a deputy to execute a warrant directed to him when by reason of sickness, absence or otherwise, he cannot do it himself; for the public good requires that there should be always some officer ready at hand to execute such warrants, and the too rigorous restraint of the service of them to the proper officer could not but sometimes cause a

<sup>1</sup> Sheriff may appoint a special deputy at common law. *Guyman v. Bur-* lingame, 86 Ill. 201; *Dungan v. Hall*, 64 Ill. 254.



failure of justice. But it is said that a constable cannot make a deputy without some such special cause.<sup>1</sup>

It seems the better opinion that a recorder of a town cannot make a deputy without a special grant or custom for that purpose, being a judicial office relating to the administration of justice.<sup>2</sup> And, therefore, where a writ was directed to the mayor, alderman and recorder of Lancaster, and the record was certified by the mayor, aldermen and deputy recorder, without showing that the recorder had power to make a deputy, the return was held naught.

It is held that the marshal of the king's bench, having the inheritance of the office with power to grant the same for life, cannot, notwithstanding, give power to such grantee for life to make a deputy.

Regularly, a deputy cannot make a deputy, because it implies an assignment of his whole power, which he cannot assign over. But if A being appointed steward of a copyhold court, to be exercised *per se vel deputatum suum*, and he appoint B his deputy who hath long exercised the said office, and B authorize C and D, jointly and severally, to take a surrender of a copyhold tenement from J. S., which is done by C, without reciting his power or any relation had to it, the surrender is good, being only a single act; for the constitution in this manner gives C the color and reputation of an authority to act as a steward *de facto*, and what he does as such is sufficient among the tenants, for they have no power to examine his authority, nor is he to render them any account of it.

It is said there cannot be an officer without deed, nor can there be any deputation of an office without deed, being a matter which lies in grant.<sup>3</sup> But the high sheriff may make an undersheriff, or his deputy, without deed, for he claims no interest in the office but as servant.<sup>4</sup>

<sup>1</sup> In *Taylor v. Brown*, 4 Cal. 188, 60 Am. Dec. 604, it is said that a constable may appoint as many deputies as he pleases. To like effect, *Jobson v. Fennell*, 85 Cal. 711.

<sup>2</sup> A clerk of court may appoint a deputy at least for the performance of ministerial acts. *Bonds v. State*, 1

*Mart. & Yerg. (Tenn.)* 143, 17 Am. Dec. 795.

<sup>3</sup> A deputy clerk may be appointed without deed. *Bonds v. State*, 1 *Mart. & Yerg. (Tenn.)* 143, 17 Am. Dec. 795.

<sup>4</sup> A sheriff can not constitute a deputy for a particular act, except by warrant in writing. *People v. Moore*,

A notary public cannot act by deputy, nor can protest of negotiable paper, except where authorized by statute or sanctioned by usage,<sup>1</sup> be made by the notary's deputy, clerk<sup>2</sup> or partner<sup>3</sup> though the latter be himself a notary.

§ 570. **Authority of Deputies.**—Where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself, and, in the absence of any showing to the contrary, it will be so presumed.<sup>4</sup>

Such a deputy is himself a public officer, known and recognized as such by law. Any act, therefore, which the officer himself might do, his general deputy may do also.<sup>5</sup>

<sup>2</sup> Doug. (Mich.) 1. See also to like effect the exhaustive discussion in *Meyer v. Bishop*, 27 N. J. Eq. 141, affirmed in *Meyer v. Patterson*, 28 N. J. Eq. 239.

<sup>1</sup> Usage may sanction protest by clerk or deputy: *Munroe v. Woodruff*, 17 Md. 159; *Miltnerberger v. Spaulding*, 33 Mo. 421; *Commercial Bank v. Varnum*, 49 N. Y. 269; *McClane v. Fitch*, 4 B. Mon. (Ky.) 599; *Carter v. Union Bank*, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89; *Locke v. Huling*, 24 Tex. 311; *Chenoweth v. Chamberlain*, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145.

<sup>2</sup> In the absence of such an usage, the notary must act in person and not by his deputy or clerk: *Ellis v. Commercial Bank*, 7 How. (Miss.) 294, 40 Am. Dec. 63; *Carmichel v. Bank*, 4 How. (Miss.) 567, 35 Am. Dec. 408; *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275; *Onondaga County Bank v. Bates*, 8 Hill (N. Y.) 59; *Sacridor v. Brown*, 8 McLean (U. S. C. C.) 481; *Ocean Nat. Bank v. Williams*, 102 Mass. 148; *Cribbs v. Adams*, 18 Gray (Mass.) 597; *Commercial Bank v. Barksdale*, 36 Mo. 565.

<sup>3</sup> *Commercial Bank v. Barksdale*, 36 Mo. 565.

<sup>4</sup> "When the law gives him power to appoint a deputy, such deputy, when created, may do any act that the principal might do. He can not have less power than the principal." *Abrams v. Ervin*, 9 Iowa 87; *Parker v. Kett*, 1 Ld. Raym. 658; *Ellison v. Stevenson*, 6 T. B. Mon. (Ky.) 275; *Triplett v. Gill*, 7 J. J. Marsh. (Ky.) 444; *Commonwealth v. Arnold*, 3 Littell (Ky.) 816; *Hope v. Sawyer*, 14 Ill. 254.

<sup>5</sup> *Abrams v. Ervin*, 9 Iowa 87.

Deputy county clerk may issue summons in his own name: *Calender v. Olcott*, 1 Mich. 344. Deputy sheriff may make return in his own name: *Wheeler v. Wilkins*, 19 Mich. 78. Deputy auditor general may sign deed in his own name: *Westbrook v. Miller*, 56 Mich. 148; *Drennan v. Herzog*, 56 Mich. 467; *Fells v. Barbour*, 58 Mich. 49. Deputy sheriff may conduct drawing to settle a tie vote: *Evans v. Sutherland*, 41 Mich. 177, or make sale on mortgage foreclosure. *Heinmiller v. Hatheway*, 60 Mich. 391; *Hoffman v. Harrington*, 33 Mich. 392. Deputy clerk may administer oaths: *Torrans v. Hicks*, 32 Mich. 307; *State v. Barrett*, — Minn. —, 41 N. W. Rep. 459. Court will take judicial notice

Where, however, the deputy is a special one, authorized to perform a specific act, his authority will be limited to the doing of that act only, and his powers cannot exceed those expressly conferred upon him and such as are necessarily implied.

A special deputy, it is said, is in no sense a public officer, but is merely the private agent or servant of the principal, and neither his appointment nor his relation to his principal can be presumed from his acts.<sup>1</sup>

## II.

### OF THE EXECUTION OF A JOINT AUTHORITY.

§ 571. **Private Trust or Agency must be executed by all.**—Where authority is conferred upon two or more agents to represent their principal in the transaction of business of a private nature, the rule is well settled that the agency will be presumed to be joint, and that it can only be performed by them all jointly unless an intent appears that it may be otherwise executed.<sup>2</sup>

This rule is well illustrated in the case of arbitrators chosen to settle a private controversy, all of whom must concur in the award unless the parties have otherwise stipulated.<sup>3</sup> Numerous other cases are also given in the notes.

of deputy county clerks: *State v. Barrett, supra*. Deputy county clerk may take acknowledgments: *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Rose v. Newman*, 26 Tex. 181, 80 Am. Dec. 646, overruling on this point *Miller v. Thatcher*, 9 Tex. 482, 60 Am. Dec. 172.

Deputy auditor of state may make sale of lands: *Bansemmer v. Mace*, 18 Ind. 27, 81 Am. Dec. 844.

<sup>1</sup> *Meyer v. Bishop*, 27 N. J. Eq. 141, affirmed in *Meyer v. Patterson*, 28 N. J. Eq. 289.

<sup>2</sup> See this subject fully discussed in *Mechem on Agency*, § 76-78. See *Cedar Rapids, &c. R. R. Co. v. Stewart*, 25 Iowa 115; *Kupfer v. Augusta*, 12 Mass. 185; *Caldwell v. Harrison*, 11 Ala. 755; *Soens v. Racine*, 10 Wis.

271; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Rogers v. Cruger*, 7 Johns. (N. Y.) 557; *Damon v. Granby*, 2 Pick. (Mass.) 845; *Sutton v. Cole*, 8 Pick. 232; *Woolsey v. Tompkins*, 23 Wend. (N. Y.) 324; *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180; *Scott v. Detroit, &c. Society*, 1 Doug. (Mich.) 119; *Low v. Perkins*, 10 Vt. 532, 33 Am. Dec. 217; *Towne v. Jaquith*, 6 Mass. 46, 4 Am. Dec. 84; *Heard v. March*, 12 Cush. (Mass.) 580; *Hawley v. Keeler*, 53 N. Y. 114; *Johnston v. Bingham*, 9 W. & S. (Penn.) 56.

<sup>3</sup> *Moore v. Ewing, Coxe* (N. J.) 144, 1 Am. Dec. 195; *Blin v. Hay*, 2 Tyler (Vt.) 804, 4 Am. Dec. 788; *Green v. Miller*, 6 Johns. (N. Y.) 89, 5 Am. Dec. 184; *Patterson v. Leavitt*, 4 Conn. 50, 10 Am. Dec. 98; *Wilder v. Ran-*

§ 572. Public Trust or Agency may be executed by a Majority, though all must meet and confer.—Where, however, a trust or agency is created by law or is public in its nature and requires the exercise of deliberation, discretion or judgment, whether it be judicial or *quasi-judicial* in its character, the rule is otherwise, and while all of the trustees, agents or officers, except where the law makes a less number a quorum, must be present to deliberate or, what is the same thing,<sup>1</sup> must be duly notified and have an opportunity to be present, yet, except where the law clearly requires the joint action of them all, it is well settled that a majority of them, where the number is such as to admit of a majority, if present, may act and that their act will be deemed the act of the body.<sup>2</sup> Where the law prescribes what shall constitute a quo-

ney, 95 N. Y. 7; *Brennan v. Willson*, 71 N. Y. 502; *Penn. v. Evans*, 28 La. Ann. 576.

<sup>1</sup> Notice, and refusal to attend are equivalent to attendance in such a case. *Horton v. Garrison*, 28 Barb. (N. Y.) 179; *Williams v. School District*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *First National Bank v. Mount Tabor*, 52 Vt. 87, 36 Am. Rep. 734.

<sup>2</sup> *First National Bank v. Mount Tabor*, 52 Vt. 87, 36 Am. Rep. 734; *People v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *Williams v. School District*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *McCready v. Guardians*, 9 Serg. & R. (Penn.) 94, 11 Am. Dec. 667; *Downing v. Rugar*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Scott v. Detroit, &c., Society*, 1 Doug. (Mich.) 119; *Jewett v. Alton*, 7 N. H. 253; *Soens v. Racine*, 10 Wis. 333; *Caldwell v. Harrison*, 11 Ala. 755; *Kingsbury v. School District*, 12 Metc. (Mass.) 99; *Cooley v. O'Connor*, 12 Wall. (U. S.) 391; *Baltimore Turnpike, Case of*, 5 Bin. (Penn.) 481;

*Louk v. Woods*, 15 Ill. 256; *Jefferson County v. Slagle*, 66 Penn. St. 203; *Austin v. Helms*, 65 N. C. 560; *Commissioners v. Lecky*, 6 S. & R. (Penn.) 166; *Commonwealth v. Commissioners*, 9 Watts (Penn.) 466, 471; *Cooper v. Lampeter*, 8 Watts 125; *Charles v. Hoboken*, 3 Dutch. (N. J.) 203; *Curtis v. Butler*, 24 How. (U. S.) 435, 450; *Jones v. Andover*, 6 Pick. (Mass.) 59; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 218; *Groton v. Hurlburt*, 22 Conn. 178; *Johnson v. Dodd*, 56 N. Y. 76; *George v. School District*, 6 Metc. (Mass.) 497; *Board v. Sackrider*, 35 N. Y. 154; *People v. Supervisors*, 11 N. Y. 563, 571; *Powell v. Tuttle*, 3 N. Y. 396; *Olmsted v. Elder*, 5 N. Y. 144; *Pell v. Ulmar*, 18 N. Y. 189; *White v. Lester*, 1 Keyes (N. Y.) 316; *L'Amoureux v. O'Rourke*, 2 Keyes, 499; *Lee v. Parry*, 4 Denio (N. Y.) 125; *McCoy v. Curtice*, 9 Wend. (N. Y.) 19, 24 Am. Dec. 113; *Whitford v. Bissell*, 14 How. Pr. (N. Y.) 302; *Horton v. Garrison*, 28 Barb. (N. Y.) 176; *People v. Walker*, 23 Barb. 304; *Keeler v. Frost*, 23 Barb. 400; *Ex parte Rogers*, 7 Cow. (N. Y.) 526; *Parrott v. Knicker-*

rum, a majority of that quorum may act.<sup>1</sup> The rule which applies in these cases has been comprehensively stated by Chief Justice SHAW as follows: "Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law if so prescribed, or by the rules and regulations of the body itself if there be any, otherwise if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend if there be a quorum."<sup>2</sup>

But if the statute clearly requires the joint action of all, a majority can not act.<sup>3</sup>

The act of the majority can only be upheld, however, when the conditions named exist. For if the minority took no part in the transaction, were ignorant of what was done, gave no implied consent to the action and were neither consulted nor had any opportunity to exert their legitimate influence in determining the course to be pursued, the action of the majority will be unavailing.<sup>4</sup>

§ 573. Same Subject—Presumption that all acted.—It will be presumed in the absence of anything to the contrary that all

bocker, 88 How. Pr. 508; Harris v. Whitney, 6 How. Pr. 175; Beekman's Petition, 31 How. Pr. 17; Whiteside v. People, 26 Wend. (N. Y.) 635; Field v. Field, 9 Wend. 894; Woolsey v. Tompkins, 28 Wend. 326; Babcock v. Lamb, 1 Cow. (N. Y.) 238; Paradise Road, *In re* 29 Penn. St. 20; Co. Litt. 181, b; Billings v. Prinn, 2 Bl. 1017; King v. Forrest, 3 T. R. 38; King v. Beeston, 3 T. R. 592; Withnell v. Gartham, 6 T. R. 388; Grindley v. Barker, 1 B. & P. 229; Attorney-General v. Davy, 2 Atk. 212; Blacket v. Blizard, 9 B. & C. 851; Cook v. Ward, 2 Com. P. Div. 255,

20 Eng. Rep. 514; Plymouth v. Plymouth Co. 16 Gray (Mass.) 841; People v. Porter, 118 Ind. 79.

<sup>1</sup> See Morawetz on Corp., § 531; Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

<sup>2</sup> In Williams v. School District, 21 Pick. (Mass.) 75, 33 Am. Dec. 248.

<sup>3</sup> First National Bank v. Mount Tabor, 52 Vt. 87, 36 Am. Rep. 784; New York L. Ins. Co. v. Staats, 21 Barb. (N. Y.) 570; Powell v. Tuttle, 8 N. Y. 396; People v. Coghill, 47 Cal. 361.

<sup>4</sup> Schenck v. Peay, 1 Woolw. C.C. 175.

met and deliberated or were duly notified<sup>1</sup> unless the statute requires an express statement of that fact in the record. If that be required, parol evidence of the fact is inadmissible.<sup>2</sup>

So where the statute makes the act of the board or body conclusive and a majority have duly acted, it is sufficient and parol evidence will not be heard to impeach its conclusiveness.<sup>3</sup>

§ 574. *Same Subject*—When no Majority possible, all must act.—Where the number is such as not to admit of a majority, as where there are only two officers, the concurrence of both is indispensable;<sup>4</sup> though it is said that if one should die or become disabled the other might act alone,<sup>5</sup> except in the case of judicial officers.<sup>6</sup> But—

§ 575. *Same Subject*—Full Board must be in Existence.—The rule permitting a majority to act implies that a full board as required by law is actually in existence. Thus where by law a board cannot consist of less than three members and only two qualify, the two cannot act for there is then no board of which the two would constitute a majority.<sup>7</sup>

§ 576. *Same Subject*—Not required to meet in any particular Office.—Though all are required to meet, it is not, unless expressly made so by the statute, indispensable to the validity of their action that they should meet in the office which they are required by law to keep. They may validly act elsewhere.<sup>8</sup>

<sup>1</sup> McCoy v. Curtice, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113; People v. Whiteside, 23 Wend. 15; Woolsey v. Tompkins, 23 Wend. 326; Doughty v. Hope, 3 Denio (N. Y.) 253; Miller Garlock, 8 Barb. (N. Y.) 157; Doolittle v. Doolittle, 31 Barb. 313; Oakley v. Aspinwall, 3 N. Y. 565; Gilderleeve v. Board of Education, 17 Abb. Pr. 210; Downing v. Rugar, 21 Wend. 178, 34 Am. Dec. 223; People v. Palmer, 53 N. Y. 87; Board v. Sackrider, 35 N. Y. 154.

<sup>2</sup> Stewart v. Wallis, 30 Barb. (N. Y.) 344, 347; People v. Williams, 36 N. Y. 441; People v. Hynds, 30 N. Y. 470; Marble v. Whitney, 28 N. Y. 207.

<sup>3</sup> First National Bank v. Mount Tabor, 53 Vt. 87, 36 Am. Rep. 734;

First National Bank v. Concord, 50 Vt. 257, 281.

<sup>4</sup> Downing v. Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223, citing 6 Vin. Abr. Coroner (H.) —, 14 Vin. Abr. Joint and Several (B.) pl. 1; Rex v. Warrington, 1 Salk. 152.

<sup>5</sup> Downing v. Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223, citing 14 Vin. Abr. Joint and Several (B.) pl. 1.

<sup>6</sup> Downing v. Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223, citing Auditor Curle's Case, 11 Rep. 2; Jenk. 40, case 76.

<sup>7</sup> Williamsburg v. Lord, 51 Me. 599; Schenck v. Peay, 1 Woolw. C. C. 175.

<sup>8</sup> Jefferson County v. Slagle, 66 Penn. St. 202.

§ 577. **Same Subject—Previous Agreement as to joint Action void.**—Inasmuch as the law thus contemplates that all will meet together and that the public will have the benefit of their combined judgment and discussion, it follows that their previous individual agreement as to how they will act when they meet as a body is opposed to public policy and void.<sup>1</sup>

Thus when the individual members of a school board had in writing agreed to a contract to purchase supplies for the district, and had in the same writing requested a special meeting of the board to be called, "at which meeting we agree with each other that we will ratify this contract," the court held the contract so agreed upon was void.

"The board is constituted," said the court, "by statute, a body politic and corporate in law, and as such is invested with certain corporate powers and charged with the performance of certain public duties. These powers are to be exercised, and these duties discharged, in the mode prescribed by law. The members composing the board have no power to act as a board except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for that purpose, all their official proceedings. They have, in their corporate capacity, the title, care and custody of all school property whatever within their jurisdiction, and are invested with full power to control the same in such manner as they may think will best subserve the interest of the common schools and the cause of education. They are required to prescribe rules and regulations for the government of all the common schools within the township. Clothed with such powers, and charged with such duties and such responsibilities, it will not be permitted to them to make any agreement among themselves or with others by which their public action is to be or may be restrained or embarrassed, or its freedom in anywise affected or impaired. The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of and upon the public matters entrusted to them in the session provided for by the statute. This cannot be when the members by pre-engagement are under contract to pursue a certain line of argument or action whether the same will be conducive to the

<sup>1</sup> *McCortle v. Bates*, 29 Ohio St. 419, 23 Am. Rep. 758.

public good or not. It is one of the oldest rules of the common law that contracts contrary to sound morals or against public policy will not be enforced by courts of justice,—*ex facto illicito non oritur actio*; and the court will not enter on the inquiry whether such contract would or would not in a given case be injurious in its consequences if enforced. It being against the public interest to enforce it, the law refuses to recognize its claim to validity.”<sup>1</sup>

§ 578. **Same Subject—All may ratify Act of Part.**—But where a portion of the board or body have attempted to do an act not within their power but within the power of the whole body when lawfully convened, the act so done may subsequently be ratified and confirmed by the whole body when they are duly assembled as such.\*

§ 579. **Presumption of due Execution.**—The law constantly presumes that public officers charged with the performance of official duty have not neglected the same but have duly performed it at the proper time and in the proper manner.<sup>2</sup> In the absence of evidence to the contrary, this presumption will prevail, but it is not an indisputable one and may be overcome by countervailing evidence.<sup>3</sup> Where the rights of the public require it the presumption in favor of due performance is liberal, and the evidence to overthrow it must be clear.<sup>4</sup>

This presumption is in accordance with the established and familiar maxim, *Omnia presumuntur rite et solemniter esse acta donec probetur in contrarium*—everything is presumed to be rightly and duly performed until the contrary is shown.<sup>5</sup>

<sup>1</sup> *Boynston, J.*, in *McCortle v. Bates*, 29 Ohio St. 419, 28 Am. Rep. 758.

<sup>2</sup> *In re Pearsall*, 9 Abb. (N. Y.) Pr. (N. S.) 203.

<sup>3</sup> *Hartwell v. Root*, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232; *Terry v. Bleight*, 8 T. B. Mon. (Ky.) 270, 16 Am. Dec. 101; *Farr v. Sims*, Rich. (S. C.) Eq. Cas. 122, 24 Am. Dec. 396; *Commonwealth v. Slifer*, 25 Penn. St. 23, 64 Am. Dec. 680;

*Squier v. Stockton*, 5 La. Ann. 120, 52 Am. Dec. 583; *Dubuc v. Voss*, 19 La. Ann. 210, 92 Am. Dec. 526.

<sup>4</sup> *Dubuc v. Voss*, 19 La. Ann. 210, 92 Am. Dec. 526.

<sup>5</sup> *Commonwealth v. Slifer*, 25 Penn. St. 23, 64 Am. Dec. 680.

<sup>6</sup> *Broom's Legal Maxims*, 944; *Storv, J.*, in *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 69, 70.



The presumption is constantly indulged in support of all kinds of official action.

§ 580. **Same Subject—Presumption not indulged to show other Officer in Default.**—But the law will not indulge the presumption that one officer has performed his duty for the mere purpose of establishing the assumption that another officer has neglected his.<sup>1</sup> As is said by COOLEY, J., "it would be a curious jumble of presumptions if we were to presume that one public officer had failed in his duty, because we could not presume that another had."<sup>2</sup> In such a case the presumption applies with equal force to each.

§ 581. **Same Subject—Exceptions—Presumption not indulged to support special statutory Proceeding in Invitum.**—But to this presumption of the due execution of official authority certain exceptions exist. Thus where the officer acts under a naked statutory power with a view to divest upon certain contingencies the title or right of a citizen, as in the case of the sale of lands for taxes<sup>3</sup> or its seizure under the right of eminent domain,<sup>4</sup> the

<sup>1</sup> *Weimer v. Bunbury*, 30 Mich. 216; *Supervisors v. Rees*, 34 Mich. 481.

<sup>2</sup> In *Weimer v. Bunbury*, 30 Mich. 216.

<sup>3</sup> FIELD, C. J., in *Keane v. Cannovan*, 21 Cal. 291, 32 Am. Dec. 738. "It may be said to be the general rule," says Judge COOLEY, "that the party claiming lands under a sale for taxes must show affirmatively that the law under which the sale was made has been substantially complied with not only in the sale itself, but in all the anterior proceedings." Cooley on Taxation, 2d Ed. p. 472, citing *Stead*

*v. Course*, 4 Cranch (U. S.) 403; *Parker v. Rule*, 9 Cranch 64; *Williams v. Peyton*, 4 Wheat. (U. S.) 77; *McClung v. Ross*, 5 Wheat. 116; *Thatcher v. Powell*, 6 Wheat. 119; *Games v. Stiles*, 14 Pet. (U. S.) 322; *Pillow v. Roberts*, 13 How. (U. S.) 472; *Moore v. Brown*, 11 How. 414; *Early v. Doe*, 16 How. 610; *Parker v. Overman*, 18 How. 142; *Little v. Herndon*, 10 Wall. (U. S.) 26; *Hughey v. Horrell*, 2 Ohio 233; *Holt v. Hemphill*, 3 Ohio 233; *Lafferty v. Byers*, 5 Ohio 453; *Thompson v. Gotham*, 9 Ohio 170; *Kellogg v. McLaughlin*, 8 Ohio 114; *Polk v.*

<sup>4</sup> See *Lewis on Eminent Domain* §§ 600-606; *Martin v. Rushton*, 42 Ala. 289; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Harlow v. Pike*, 3 Me. 488; *Prentiss v. Parks*, 65 Me. 559; *Owings v. Worthington*, 10 G. & J. (Md.) 283; *People v. Highway Commissioners*, 16 Mich. 63;

*Ells v. Pacific R. R. Co.* 51 Mo. 200; *Zimmerman v. Snowden*, 88 Mo. 218; *White v. Memphis, &c., R. R. Co.* 64 Miss. 566; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. (N. Y.) Cases 107; *Harbeck v. Toledo*, 11 Ohio St. 219; *State v. Officer*, 4 Oreg. 180.

regularity of the proceedings will not be presumed, but it is incumbent upon the person claiming by virtue of them to show that every preliminary step required by the law has been taken.

### III.

#### IN WHOSE NAME AUTHORITY SHOULD BE EXERCISED.

§ 582. **Public Officer Acts in Name of Government.**—The government being the source of the authority of the public officer from which all his rights and powers are derived, it follows that the execution of his authority and the justification of his lawful act should be in the name of the government.

By the express terms of the constitutions of many of the States, the style of all process shall be: "In the name of the People of the State," or other equivalent expression.<sup>1</sup>

§ 583. **Should not make Contracts or transact Business for Public in his own Name.**—In transacting business and making

Rose, 25 Md. 153, 89 Am. Dec. 773; Pope v. Headen, 5 Ala. 493; Elliott v. Eddins, 24 Ala. 508; Garret v. Wiggins, 2 Ill. 335; Fitch v. Pinckard, 5 Ill. 69; Doe v. Leonard, 5 Ill. 140; Wiley v. Bean, 6 Ill. 802; Irving v. Brownell, 11 Ill. 402; Spellman v. Curtenius, 12 Ill. 409; Marsh v. Chestnut, 14 Ill. 224; Goewey v. Urig, 18 Ill. 242; Lane v. Bommelmenn, 21 Ill. 143; Charles v. Waugh, 25 Ill. 315; Norris v. Russell, 5 Cal. 250; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 788; O'Brien v. Coulter, 2 Blackf. (Ind.) 421; Williams v. State, 6 Blackf. 36; Wiggins v. Holley, 11 Ind. 2; Gavin v. Shuman, 23 Ind. 32; Ellis v. Kenyon, 25 Ind. 124; Jackson v. Shepard, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502; Atkins v. Kinnan, 20 Wend. (N. Y.) 241, 32 Am. Dec. 534; Sharp v. Speir, 4 Hill (N. Y.) 76; Sharp v. Johnson, 4 Hill 92, 40 Am. Dec. 259; Newell v. Wheeler, 48 N. Y. 486; Westfall v. Preston, 49 N. Y.

349; Hall v. Collins, 4 Vt. 316; Bellows v. Elliott, 12 Vt. 569; Brown v. Wright, 17 Vt. 97, 42 Am. Dec. 481; Waldron v. Tuttle, 8 N. H. 840; Cass v. Bellows, 31 N. H. 501, 64 Am. Dec. 347; Harvey v. Mitchell, 31 N. H. 575; Annan v. Baker, 49 N. H. 161; Scott v. Detroit, &c. Society, 1 Doug. (Mich.) 119; Latimer v. Lovett, 2 Doug. (Mich.) 204; Scott v. Babcock, 3 Greene (Ia.) 133; Gaylord v. Scarff, 6 Ia. 179; McGahen v. Carr, 6 Iowa 381, 71 Am. Dec. 421; Morton v. Reeds, 6 Mo. 64; s. c. 9 Mo. 868; Nelson v. Goebel, 17 Mo. 161; Kelly v. Medlin, 26 Tex. 48; Cummings v. Holt, 56 Vt. 334; Woodbridge v. State, 48 N. J. 262.

<sup>1</sup>This provision in Michigan applies only to writs issued by courts or judicial officers; Tweed v. Metcalf, 4 Mich. 579; Wisner v. Davenport, 5 Mich. 501, and so in Illinois, Ferris v. Crow, 5 Gilm. 96; Missouri, Little v. Little, 5 Mo. 227.

contracts in behalf of the public, the officer should make all contracts and take all obligations in the name of the public. Public policy forbids that he should transact public business in his own name.<sup>1</sup>

So all accounts, vouchers and other evidences of public rights and transactions should be kept and made in the name of the public and in such a manner as to be readily distinguishable from his own.<sup>2</sup>

§ 584. **In whose Name Deputy should act.**—The question in whose name a deputy officer should act is one of much importance and of considerable apparent uncertainty. The conflict in the cases is, however, believed to be more apparent than real, and to be readily settled by reference to principles already considered.

In several of the States the authority to act in an official capacity is given to the principal alone, or, if the appointment of deputies is recognized or authorized by law, they are regarded as the mere private agents or servants of the principal and not as independent public officers deriving independent authority from the law. Where such is the case, the authority exercised by the deputy is, manifestly, a derivative and subsidiary one,—it is the authority conferred upon the principal and not an authority inherent in the deputy. It follows then, logically and legally, that the authority should be exercised in the name of him in whom it exists and not in his name who of himself has no recognized authority at all. The execution should, therefore, be in the name of the principal alone or in the name of the principal by the deputy.<sup>3</sup>

<sup>1</sup> *Hunter v. Field*, 20 Ohio 340; *Gilmore v. Pope*, 5 Mass. 491; *Irish v. Webster*, 5 Greenl. (Me.) 171.

<sup>2</sup> *Hunter v. Field*, 20 Ohio 340.

<sup>3</sup> Returns of the service of process, &c., must be in name of the principal, and a return in the name of "A. B. Deputy," &c., is invalid; *Joyce v. Joyce*, 5 Cal. 449; *Rowley v. Howard*, 23 Cal. 402. (In California the official power is vested in the principal.)

*Ryan v. Eads*, Breese (Ill.) 168; *Ditch v. Edwards*, 1 Scammon (Ill.) 127, 26 Am. Dec. 414; *Village of Glencoe v. People*, 78 Ill. 882. (In Illinois the statute gives effect to the acts of the deputy when done in the name of his principal.) *Arnold v. Scott*, 39 Tex. 378. (The earlier Texas cases were the other way. *Miller v. Alexander*, 13 Tex. 497, 65 Am. Dec. 73; *Towns v. Harris*, 13 Tex. 507. See also *State v. Brooks*, 42 Tex. 66.) *Simonds v.*

In other States, as has been seen, the deputy is recognized as an independent public officer and is endowed by law with authority to do any act which his principal might do. In these cases where the authority exists in the deputy himself by operation of law and is not derived solely through the principal, it is well executed in the name of him in whom it exists, the deputy himself.<sup>1</sup>

Under either state of facts, the authority of a special deputy, who, as has been seen, is regarded as the mere private agent or servant of the principal, would, unless otherwise provided by statute, be properly exercised in the name of the principal.\*

Catlin, 3 Cal. (N. Y.) 61; Ferguson v. Lee, 9 Wend. (N. Y.) 258.

Deeds on sheriffs' sales are not valid where made in name of deputy. *Lewes v. Thompson*, 3 Cal. 266; *Evans v. Wilder*, 7 Mo. 359; *Anderson v. Brown*, 9 Ohio 151; *Parker v. Kett*, 1 Salk. 96.

<sup>1</sup>Deputy county clerk may issue summons in his own name. *Calender v. Olcott*, 1 Mich. 344. Deputy or under sheriff may make return in his own

name. *Wheeler v. Wilkins*, 19 Mich. 78; *Allen v. Hazen*, 26 Mich. 142; *Calender v. Olcott*, *supra*; *Eastman v. Curtis*, 4 Vt. 616; *DeVillers v. Ford*, 2 McCord 144. Deputy auditor-general may make deed in his own name. *Westbrook v. Miller*, 56 Mich. 148; *Drennan v. Herzog*, 56 Mich. 467; *Fells v. Barbour*, 58 Mich. 49.

\**Village of Glencoe v. People*, 78 Ill. 332.

## BOOK IV.

### OF THE RIGHTS, DUTIES AND LIABILITIES GROWING OUT OF THE RELATION.

#### CHAPTER I.

##### OF THE DUTIES AND LIABILITIES OF PUBLIC OFFICERS TO INDIVIDUALS—IN GENERAL, WITH SUBDIVISIONS.

§ 585. Purpose of Book IV.

586. What necessary to be considered.

§ 587. How Officers classified for this Purpose.

588. How Subject divided.

§ 585. Purpose of Book IV.—Having seen in the preceding chapters how public offices are filled and vacated; what power attaches to them, and how it is to be construed and executed, it remains to consider here what rights, duties and liabilities grow out of the relation.

§ 586. What necessary to be considered.—In order to a clear idea of the whole subject, some consideration may perhaps be advantageously given at the outset to the nature of the duties and liabilities of public officers in general, and that subject will be treated in the following chapter.

§ 587. How Officers classified for this Purpose.—Many classifications of public officers have been made, some of which have been already noticed. No one of these is, for all purposes, entirely satisfactory. The supreme court of Indiana, in one case,<sup>1</sup> have classified all civil officers as political, judicial and ministerial, including under the first head (1) those officers whose duties pertain to the administration of the government, the

<sup>1</sup> Waldo v. Wallace, 12 Ind. 569.

administrative or executive officers, and, (2) those who make the laws by which the government is to be executed, or the legislative officers. For convenience sake, and not because it is considered the best possible, this classification will be adopted for the present purposes, and the subject will be considered under the heads of (1) governmental, (2) judicial, (3) legislative and (4) ministerial officers.

§ 588. **How Subject divided.**—In order to a complete view of the subject we shall consider :—

- A. Their liability in tort.
- B. Their liability in contract.

Under A. will be considered :—

- I. Their liability for their own torts.
- II. Their liability for the torts of their official subordinates.
- III. Their liability for the torts of their private servants or agents.

Under each of these last subdivisions must be treated :

- 1. The duties and liabilities of governmental officers.
- 2. The duties and liabilities of judicial officers.
- 3. The duties and liabilities of legislative officers.
- 4. The duties and liabilities of ministerial officers.

## CHAPTER II.

### OF DUTIES AND LIABILITIES IN GENERAL.

**§ 589. Purpose of this Chapter.**

**I. OF DUTIES IN GENERAL.**

**590. Classification—Duties to Public; Duties to Individuals.**

**591. 1. Of Duties to the Public.**

**592. 2. Of Duties to Individuals.**

**593. When Authority to act implies the Duty to do so—"May" construed to mean "shall."**

**594. Performance of Duties resting in Discretion.**

**595. Effect of increasing Duties without increasing Compensation.**

**§ 596. How when no Compensation attached to Office.**

**II. OF LIABILITY IN GENERAL.**

**597. Liability follows Duty.**

**598. No Right of Action by an Individual for a Breach of Duty owing solely to the Public.**

**599. Same Subject—Inquiry alone does not confer Right of Action.**

**600. Individual suing must show special Injury to himself.**

**§ 589. Purpose of this Chapter.**—Before proceeding to a detailed consideration of the duties and liabilities of particular classes of officers, some attention may well be paid to certain of the principles governing public duties and liabilities generally. Here, therefore, will be considered:—

I. Duties in general.

II. Liabilities in general.

#### I.

#### OF DUTIES IN GENERAL.

**§ 590. Classification—Duties to Public; Duties to Individuals.**—Public officers may be divided, in respect of the person to whom the performance of their duty is due, into two general classes, the distinguishing lines of which are not always clearly discernible but which are yet important to be considered.

**§ 591. 1. Of Duties to the Public.**—The first of these classes embraces those officers whose duty is owing primarily to the

public collectively,—to the body politic,—and not to any particular individual; who act for the public at large, and who are ordinarily paid out of the public treasury.

The officers whose duties fall wholly or partially within this class are numerous and the distinction will be readily recognized. Thus the governor owes a duty to the public to see that the laws are properly executed, that fit and competent officials are appointed by him, that unworthy and ill-considered acts of the legislature do not receive his approval, but these, and many others of a like nature, are duties which he owes to the public at large and no one individual could single himself out and assert that they were duties owing to him alone. So members of the legislature owe a duty to the public to pass only wise and proper laws, but no one person could pretend that the duty was owing to himself rather than to another. Highway commissioners owe a duty that they will be governed only by considerations of the public good in deciding upon the opening or closing of highways, but it is not a duty to any particular individual of the community.

These illustrations might be greatly extended, but it is believed that they are sufficient to define the general doctrine.

§ 592. 2. *Of Duties to Individuals.*—The second class above referred to includes those who, while they owe to the public the general duty of a proper administration of their respective offices, yet become, by reason of their employment by a particular individual to do some act for him in an official capacity, under a special and particular obligation to him as an individual. They serve individuals chiefly and usually receive their compensation from fees paid by each individual who employs them.

A sheriff or constable in serving civil process for a private suitor, a recorder of deeds in recording the deed or mortgage of an individual, a clerk of court in entering up a private judgment, a notary public in protesting negotiable paper, an inspector of elections in passing upon the qualifications of an elector, each owes a general duty of official good conduct to the public, but he is also under a special duty to the particular individual concerned which gives the latter a peculiar interest in its due performance.

The results of these distinctions will be observable further on.



§ 593. When Authority to act implies the Duty to do so—"May" construed to mean "shall."—Authority to perform acts of public concern is often conferred in language which, in form, seems to be permissive only, leaving it to the option of the officer whether he will act or not, and the question arises whether the imposition of the authority creates an implied duty to exercise it.

In a case<sup>1</sup> involving this question it appeared that an act of the legislature had made it lawful for a municipal corporation to make and repair sewers, and that the corporation had appointed officers to attend to this matter. An individual claiming to be injured by a defective sewer brought an action against the corporation, and it was objected that it was under no obligation to keep them in repair. But the court by NELSON, Ch. J., said: "This statute is one of public concern, relating exclusively to the public welfare; and, though permissive merely in its terms, it must be regarded, upon well settled rules of construction, as imperative and peremptory upon the corporation. When the public interest calls for the execution of the power thus conferred, the defendants are not at liberty arbitrarily to withhold it. The exercise of the power becomes then a duty which the corporation are bound to fulfill. In the case of *The King v. The Inhabitants of Derby*,<sup>2</sup> a motion was made to quash an indictment found against the inhabitants for refusing to meet and make a rate to pay the constables' tax. The ground taken for the motion was that the statute was not imperative, but merely 'they *may* meet,' etc. The court, however, said: '*May*, in the case of a public officer, is tantamount to *shall*; and if he does not do it (the act required), he shall be punished, etc.' The same principle was also held in the case of *The King v. Barlow*,<sup>3</sup> where church wardens were indicted for not making a rate or assessment under the 14 Car. 2 ch. 12, § 18. The statute said they 'shall have power and authority to make a rate,' etc.; and it was insisted they were simply invested with a power to do the act, but were under no such obligation or duty to perform it as to render them punishable for neglecting it. The court held otherwise, observing that 'where a statute directs the doing of

<sup>1</sup> *Mayor v. Furze*, 3 Hill (N. Y.) 612.

<sup>2</sup> *Skinner*, 870.

<sup>3</sup> 2 Salk. 609, a. c. Carth. 298.

a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*.' And it was added that where a statute says 'the sheriff *may* take bail, this is construed he *shall*, for he is compelled to do so.'"<sup>1</sup>

*The Rule*—"The inference," continues the same judge, "deducible from the various cases on this subject seems to be that *where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty though the phraseology of the statute be permissive merely and not peremptory.*"<sup>2</sup>

§ 594. **Performance of Duties resting in Discretion.**—There is, however, a large class of cases where the question of acting or not is one resting purely in the discretion of the officer. Where this discretion exists, no other criterion can be resorted to. The pardoning power of the executive furnishes one of many illustrations of this rule. The governor *may*, in his discretion, grant a pardon, but no one can have a legal right to be pardoned, nor can he appeal to any other tribunal than that created by law,—the executive discretion. The law does not attempt by its process to control discretionary power.

Analogous to but not identical with this, is the case in which the law requires the officer to *act* according to his discretion. Here the *duty* to act is imperative, but the *manner* of acting is discretionary. The performance of the duty may be enforced, but the exercise of the discretion will not be coerced. In other words, the officer may be required to act, but not to act in any particular way. Illustrations of this, among many others, may be found in the duty of auditing officers. They may be required to meet and hear the claims to be presented, but whether they

<sup>1</sup>See also Comb. 220; Backwell's Case, 1 Vern. 158 and note 1. The People v. Corporation of Albany, 11 Wend. (N. Y.) 589, 27 Am. Dec. 93; Attorney-General v. Lock, 8 Atk. 166; Stamper v. Miller, 8 Atk. 212; Newburgh Turnp. Co. v. Miller, 5 Johns. (N. Y.) Ch. 101, 118, 9 Am. Dec. 274; Malcolm v. Rogers, 5 Cowen (N. Y.) 188, 15 Am. Dec. 464.

<sup>2</sup>The rule had been previously stated by Chancellor KENT, in almost the same words in Newburgh Turnp. Co. v. Miller, 5 Johns. (N. Y.) Ch. 101, 118, 9 Am. Dec. 274, and has been approved in many subsequent cases. Logansport v. Wright, 25 Ind. 512; Cutler v. Howard, 9 Wis. 809; Smith v. State, 1 Kans. 365.

shall approve or disapprove of them rests in their official discretion.<sup>1</sup>

§ 595. **Effect of increasing Duties without increasing Compensation.**—Public offices and the rights and duties attached to them being created by law, it is, as has been seen,<sup>2</sup> except in certain cases protected by the constitution, entirely within the discretion of the legislature to increase or diminish the duties of a public office at pleasure. The fact that, during the term of an incumbent, the duties are increased by the addition of others falling within the general scope of the office, without increasing the compensation, does not relieve the officer from his duty of performance.<sup>3</sup>

§ 596. **How when no Compensation attached to Office.**—Compensation is usually attached to a public office, but it is not always or necessarily so. Some offices, as has been seen,<sup>4</sup> are honorary, and where such an office is accepted and its performance is assumed, the officer must owe to the persons entitled by law to demand his services and to the public the same duty of due performance as though his office were one of profit.<sup>5</sup>

## II.

### OF LIABILITY IN GENERAL.

§ 597. **Liability follows Duty.**—The *liability* of a public officer to an individual or the public is based upon and is co-extensive with his *duty* to the individual or the public. If to the one or the other he owes no duty, to that one he can incur no liability.

<sup>1</sup> LOWRIE, C. J., in a Pennsylvania case, expresses the rule as follows: "Where any person has the right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority

is essentially discretionary, no legal duty is imposed." *Carr v. Northern Liberties*, 35 Penn. St. 324, 78 Am. Dec. 342.

<sup>2</sup> See *ante*, § 465.

<sup>3</sup> *Andrews v. United States*, 2 Story (U. S. C. C.) 203, 208.

<sup>4</sup> See *ante*, § 15.

<sup>5</sup> See *post*, § 681.

From this it follows as a necessary consequence that there can be—

§ 598. **No Right of Action by an Individual for a Breach of Duty owing solely to the Public.**—As has been seen above, public officers, in respect of the person or persons to whom their duty is owing, are divided into two classes,—those whose duty is owing solely to the public, and those whose duty is owing in some degree to individuals. The first question for determination, therefore, in considering the liability of a public officer to private action is whether that officer owes any duty to the individual complaining. If he does not, then the individual has no right of action, even though he may have been injured by the action or non-action of the officer.<sup>1</sup> The remedy in such a case must be by public prosecution.<sup>2</sup>

§ 599. **Same Subject—Injury alone does not confer Right of Action.**—The mere fact that the individual has sustained injury by reason of the act of the public officer is not enough to create a right of action. In order to create the right of action, two things must concur,—damage to himself and a wrong committed by the other party.<sup>3</sup> Otherwise it is *damnum absque injuria*.

The action of public officers may often result in an injury to an individual. Thus, says Judge COOLEY,<sup>4</sup> in speaking of officers entrusted with the power to lay out, alter or discontinue highways: “They may decline to lay out a road which an individual desires, or they may conclude to discontinue one which it is for his interest should be retained. There is in such a case a damage to him but no wrong to him. In performing or failing to perform a public duty, the officer has touched his interest to his prejudice. But the officer owed no duty to him as an individual; the duty performed or neglected was a public duty. An individual can never be suffered to sue for an injury which technically is one to the public only; he must show a wrong which he specially suffers, and damage alone does not constitute a wrong.”

<sup>1</sup> *Moss v. Cummings*, 44 Mich. 359; *Butler v. Kent*, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219; *Cooley on Torts*, (1st ed.) § 79; *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169.

<sup>2</sup> *Bartlett v. Crozier*, 17 Johns. (N. Y.) 449, 8 Am. Dec. 428.

<sup>3</sup> *Waterer v. Freeman*, Hob. 266; *BAYLEY, J.*, in *Rex v. Commissioners* 8 B. & C. 302.

<sup>4</sup> *Cooley on Torts* (1st ed.) 882.

§ 600. Individual suing must show special injury to himself—And to sustain an action by a private individual against a public officer it must not only appear that the duty violated was one owing to individuals, but the individual suing must show some reason why he singles himself out as the party injured. In other words, he must show that he, as distinguished from individuals in general, has suffered some special and peculiar injury from the wrongful act of which he complains.<sup>1</sup>

<sup>1</sup> *Moss v. Cumming*, 44 Mich. 859; *Raynsford v. Phelps*, 48 Mich. 343, 33 Am. Rep. 189.

## CHAPTER III.

### OF THE LIABILITY OF GOVERNMENTAL OFFICERS TO PRIVATE ACTION.

§ 601. Purpose of this Chapter.

602. Each Branch of the Government independent.

603. Governmental Duties are owing to the Public.

604. Governmental Powers are confided to the Discretion of the Officer.

605. Governmental Officers not liable to private Action.

606. Upon what Officers this Power is conferred.

I. EXECUTIVE OFFICERS OF THE GOVERNMENT.

607. President of the United States.

§ 608. Cabinet Officers and Heads of Departments.

609. Governors of States.

610. Same Subject—How in Case of ministerial Duties.

611. Other State Officers.

II. PUBLIC BOARDS, COMMISSIONERS AND TRUSTEES.

612. In general.

613. Enjoy Immunity as State Agencies.

614. Individual Members liable when.

615. How when Trustees, &c. are incorporated.

§ 601. Purpose of this Chapter.—It is the purpose in this chapter to discuss the liability to private action of that large class of public officers who are directly concerned in the administration and execution of the government. For convenience sake, they are here designated governmental officers, and are to be distinguished from the legislative or law making officers; from the judicial or law construing and applying officers; and from the ministerial officers who execute the mandates of superior officers and courts.

602. Each Branch of the Government independent.—Under our system of government, the governmental powers are distributed among the three great departments, the executive, the legislative and the judicial; and each of these departments while acting within its limits is, and of necessity must be, independent of the others. It is, therefore, a fundamental principle in our law that neither shall be subordinated to another, and hence

neither of the other two can be called upon to answer to the judicial department for the manner in which it exercises the powers which have been confided to it.<sup>1</sup>

§ 603. **Governmental Duties are owing to the Public.**—Again, the duties which are imposed upon these great departments are such as are owing to the public at large and not to individuals, and this rule is as true of the executive department in the exercise of the constitutional powers confided to it as such, as it is of either of the others. For the performance of such duties, as has been seen, the officer must respond only to the public and not to individuals.<sup>2</sup>

§ 604. **Governmental Powers are confided to the Discretion of the Officer.**—So, also, the powers which by the constitution are conferred upon the executive department are usually of such a nature as are confided to its discretion. They are often called political powers, and for their due administration the judgment and discretion of the officer to whom they are confided must be appealed to. In the exercise of such powers, it is well settled that the officer will not be controlled by the courts,<sup>3</sup> but he is, as was said by Chief Justice MARSHALL, “accountable only to his country in his political character, and to his conscience.”<sup>4</sup>

§ 605. **Governmental Officers not liable to private Action.**—Following out the doctrine of the preceding sections, therefore, it may be laid down as a general rule that no public officer or agency charged with the exercise of governmental authority of this description, can be called upon to answer, in a private action, for the manner in which that authority has been exercised.<sup>5</sup>

§ 606. **Upon what Officers this Power is conferred.**—This discretionary, governmental authority is conferred most largely upon the chief executive of the government; but it is not confined to him and will be found confided to a large number of inferior officers and boards who are entitled to the same immunity.

<sup>1</sup> See Cooley's Const. Lim. 49, *et seq.*; Cooley on Torts, 377.

<sup>2</sup> See *ante*, § 598.

<sup>3</sup> See *post*, § 945.

<sup>4</sup> In *Marbury v. Madison*, 1 Cranch (U. S.) at p. 166.

<sup>5</sup> See Shearman & Redfield on Negligence [last ed.], § 252.

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EXECUTIVE OFFICERS OF THE GOVERNMENT.

§ 607. *President of the United States.*—No case has yet arisen in which it has been attempted to hold the President of the United States amenable to a private action for his official conduct; and, certainly, so far as the performance of the great political powers which are conferred upon him is concerned, no such action could be maintained. Speaking of this subject, Chief Justice MARSHALL said: "It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."<sup>1</sup>

§ 608. *Cabinet Officers and Heads of Departments.*—The same immunity has been extended to cabinet officers and the heads of departments in the performance of those duties which are confided to their official judgment and discretion.<sup>2</sup>

Where, however, these officers have been charged with the performance of purely ministerial duties for the benefit of individuals, they have been compelled by mandamus to do their duty.<sup>3</sup>

No case has been discovered in which damages were sought to be recovered against such an officer for the non-performance of his legal duty, but in cases of the second class no satisfactory reason is apparent why such an action should not lie.

§ 609. *Governors of States.*—The same immunity extends also to the governors of States. "The governor of the State,"

<sup>1</sup> In *Marbury v. Madison*, 1 Cranch (U. S.) at p. 170.

<sup>2</sup> *United States v. Commissioner*, 5 Wall. (U. S.) 568; *Decatur v. Paulding*, 14 Pet. (U. S.) 497; *New York*

*Ins. Co. v. Adams*, 9 Pet. (U. S.) 578.

<sup>3</sup> *Kendall v. United States*, 12 Pet. (U. S.) 524; *Butterworth v. United States*, 112 U. S. 50.



says Judge COOLEY, "is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws; but neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforcement of the laws. The executive, in these particulars, exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department, and this would be inconsistent with the theory of republican institutions. Each department, within its province, is and must be independent."<sup>1</sup>

In accordance with this theory of the independence of the executive, it is held by many of the courts that mandamus will not lie against the governor to compel the performance of any of the duties which the law imposes upon him.<sup>2</sup>

§ 610. **Same Subject—How in case of ministerial Duties.**—But, as will be seen,<sup>3</sup> there is a growing tendency on the part of the courts in other States to hold that where the duty of performing purely ministerial acts, in which private individuals have a special interest, is positively imposed upon the governor of a State by law, the performance of the duty may be enforced by mandamus as in other cases of ministerial action.<sup>4</sup>

<sup>1</sup> Cooley on Torts (1st ed.) 377.

<sup>2</sup> See *post*, § 954; *Hawkins v. Governor*, 1 Ark. 570, 83 Am. Dec. 346; *State v. Warmoth*, 22 La. Ann. 1, 2 Am. Rep. 712; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *State v. Warmoth*, 24 La. Ann. 351, 13 Am. Rep. 126; *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 89; *Jonesboro Turnpike v. Brown*, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; *Vicksburg R. R. Co. v. Lowry*, 61 Miss. 103, 48 Am. Rep. 76; *State v. Drew*, 17 Fla. 67; *Low v. Towns*, 8 Ga. 360; *People v. Bissell*, 19 Ill. 229; *People*

*v. Yates*, 40 Ill. 126; *People v. Culom*, 100 Ill. 472; *Dennet v. Governor*, 82 Me. 508; *Rice v. Austin*, 19 Minn. 103, 18 Am. Rep. 330; *Western R. R. Co. v. De Graff*, 27 Minn. 1; *State v. Governor*, 39 Mo. 888; *State v. Price*, 1 Dutch. (N. J.) 931.

<sup>3</sup> See *post*, § 556.

<sup>4</sup> *Martin v. Ingham*, 38 Kans. 641; *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *Middleton v. Low*, 30 Cal. 596; *Tennessee R. R. Co. v. Moore*, 36 Ala. 371; *Wright v. Nelson*, 6 Ind. 496; *Baker v. Kirk*, 33 Ind. 517; *Gray v. State*, 72 Ind. 567; *Ma*

No case has been discovered in which an action for damages has been sought to be maintained against the governor for his neglect or refusal to perform such an act, but if he is amenable to mandamus, no satisfactory reason is apparent why he may not be compelled to respond in damages.

§ 611. **Other State Officers.**—The same rules have been applied to other State officers. As will be seen, the courts will not undertake to control official discretion or the performance of doubtful or uncertain duties, but where the duty to perform a ministerial act is clearly and imperatively imposed upon such an officer, the courts will enforce its performance by mandamus.<sup>1</sup>

## II.

### PUBLIC BOARDS, COMMISSIONERS AND TRUSTEES.

§ 612. **In general.**—It frequently becomes necessary in carrying on the general functions of the government, particularly in those cases in which the government is undertaking the construction or operation of public works, to delegate to a board of commissioners, trustees or the like, some portion of the governmental powers to be exercised in that regard.

§ 613. **Enjoy Immunity as State Agencies.**—In such cases, such boards become agencies of the State, and the members of them enjoy the immunity from private action which attends the exercise of governmental powers.<sup>2</sup>

§ 614. **Individual Members liable when.**—The individual members are, therefore, not liable to private action for the results of the due and proper exercise of the powers lawfully conferred upon them;<sup>3</sup> nor can they be held liable for the doing or not doing of those things which the law has confided to their official

*gruder v. Swann*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 573; *Chamberlain v. Sibley*, 4 Minn. 309; *Ohumasero v. Potts*, 3 Mont. 242; *State v. Blasdel*, 4 Nev. 241; *Cotten v. Ellis*, 7 Jones (N. C.) L. 545; *State v. Chase*, 5 Ohio St. 528.

<sup>1</sup> See *post*, §§ 954-962.

<sup>2</sup> See *Walsh v. Trustees*, 96 N. Y. 427; *Nugent v. Levee Commissioners*, 58 Miss. 197; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686.

<sup>3</sup> *Walsh v. Trustees*, 96 N. Y. 427; *Hall v. Smith*, 2 Bing. 156.

discretion.<sup>1</sup> Neither, in the absence of any personal negligence, can they be held personally liable for the defaults or neglects of the servants or agents whom they are officially required to employ.<sup>2</sup>

Where, however, clear and positive duties are imposed upon them in whose due performance individuals have a special interest, they may be held liable for neglects or defaults in the performance of such duties.<sup>3</sup> And such an officer may also be held liable for the misconduct or neglect, in the scope of their employment, of those employed by or under him, voluntarily and privately, and paid by or responsible to him.<sup>4</sup>

§ 615. *How when Trustees, etc., are incorporated.*—The questions presented here are to be distinguished from those arising in those cases, far from uniform, in which the liability of *incorporated* boards, trustees and commissioners was involved, and in which it is generally held that where an incorporated body is charged with the performance of a public duty and is provided with funds for its performance, it may be charged as an incorporated body for its neglect in performance.<sup>5</sup>

<sup>1</sup> *Hannon v. Agnew*, 96 N. Y. 439, where trustees of the Brooklyn bridge were held not liable for an error in judgment in not providing a sufficient police force on the bridge.

<sup>2</sup> *Walsh v. Trustees*, 96 N. Y. 427. In this case trustees of Brooklyn bridge were held to be "either agents of the State or agents of the two cities of New York and Brooklyn for the construction of the bridge, and hence that they were not the legal superior of the laborers, and were responsible only for their own personal misconduct or negligence." Trustees of schools not liable, where acting gratuitously as public officers, for neglect of persons necessarily employed by them. *Donovan v. McAlpin*, 85 N. Y. 185; *Bassett v. Fish*, 75 N. Y. 803. See also *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Le Despen-*

*cer*, Cowp. 754; *Nicholson v. Mounsey*, 15 East. 384.

<sup>3</sup> See *Bassett v. Fish*, 75 N. Y. at p. 810; *Hover v. Barkhoof*, 44 N. Y. 113.

<sup>4</sup> *Bassett v. Fish*, 75 N. Y. at p. 810; *Shepherd v. Lincoln*, 17 Wend. (N. Y.) 250.

<sup>5</sup> See *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686; *Coe v. Wise*, 5 Best & S. 439; *Winch v. Conservators*, L. R. 7 C. P. 458, 8 Eng. Rep. 844 s. c. L. R. 9 C. P. 378, 10 Eng. Rep. 213; *Gla vin v. Rhode Island Hospital*, 12 R. I. 411, 84 Am. Rep. 675.

*Contra*, *Nugent v. Levee Commissioners*, 58 Miss. 197; *McDonald v. Massachusetts General Hospital*, 120 Mass. 433; *Fire Ins. Patrol v. Boyd*, 120 Penn. St. 624, 6 Am. St. Rep. 745.

## CHAPTER IV.

### OF THE LIABILITY OF JUDICIAL OFFICERS TO PRIVATE ACTION.

§ 616. Purpose of this Chapter.

617. Who meant by judicial Officer.

618. Same Subject—Judicial Officer—Quasi-judicial Officer.

#### I. JUDICIAL OFFICERS.

619. Judicial Officer not liable for private Action for judicial Act within his Jurisdiction.

620. Same Subject—Other Reasons.

621. This Immunity from Liability is not affected by Motive.

622. This Immunity extends to judicial Officers of all Grades.

623. Officer must have acted officially.

624. Jurisdiction essential to this Immunity.

625. Jurisdiction defined—Jurisdiction of the Person, of the Subject-Matter, of the Res.

626. Act must be confined within his Jurisdiction.

627. Same Subject—When Jurisdiction presumed—Superior and inferior Courts.

628. Same Subject—Judge of Superior Court liable only where there is a clear Absence of all Jurisdiction.

629. Same Subject—Distinction between Absence and Excess of Jurisdiction.

630. Same Subject—Judge of inferior Court liable where he

acts without or in Excess of his Jurisdiction.

§ 631. Same Subject—Liability for acting under void Statute.

632. Same Subject—Limitations on Liability of inferior Officer for Error in assuming doubtful Jurisdiction.

633. Same Subject—Reasons assigned for this Distinction.

634. Same Subject—Officer not liable when Jurisdiction is assumed through Mistake of Fact.

635. Judicial Officer is liable when he acts ministerially.

#### II. QUASI-JUDICIAL OFFICERS.

636. In general.

637. Quasi-Judicial Functions defined.

638. Quasi-Judicial Officer exempt from civil Liability for his official Actions.

639. Same Subject—To what Officers this Rule applies.

640. Same Subject—Whether Liability affected by Motive.

641. Same Subject—Officer must keep within his Jurisdiction.

642. Same Subject—Quasi-Judicial Officer liable who invades Rights of Property.

643. Same Subject—Liable where he acts ministerially.

§ 616. Purpose of this Chapter.—Coming now to the second great class of public affairs, it is proposed to examine into the

liability which a judicial officer may incur to private individuals while exercising or assuming to exercise the authority conferred upon him.

§ 617. **Who meant by Judicial Officer.**—By the term *judicial officer* is meant, in its broad sense, whatever public officer is invested by law with the power and duty of exercising judicial powers. But—

§ 618. **Same Subject—Judicial Officer, Quasi-judicial Officer.**—In deference to a somewhat extended practice, as well as in view of certain distinctions supposed to exist, the term judicial officer will here be used to signify such officers as exercise judicial powers in *courts* of greater or less jurisdiction, *i. e.*, judges and inferior magistrates.

On the other hand those officers who are called upon to exercise judgment and discretion, but not in courts, will be designated by the term *quasi-judicial officers*.

## I.

### JUDICIAL OFFICERS.

§ 619. **Judicial Officer not liable to private Action for judicial Act within his Jurisdiction.**—It is a general principle, abundantly sustained by authority and reason, that no civil action can be sustained against a judicial officer for the recovery of damages by one claiming to have been injured by the officer's judicial action within his jurisdiction.<sup>1</sup> From the very nature of the

<sup>1</sup> *Randall v. Brigham*, 7 Wall (U. S.) 585; *Bradley v. Fisher*, 13 Wall. (U. S.) 335; *Fray v. Blackburn*, 3 B. & S. 576; *Floyd v. Barker*, 13 Coke 25; *Hire v. Sedgwick*, 2 Roll. 109; *Hammond v. Howell*, 1 Mod. 184; *Groenvelt v. Burwell*, 1 Salk. 896, 1 Ld. Raym. 454; *Miller v. Seare*, 2 Bl. 1145; *Mostyn v. Fabrigas*, 1 Cowp. 172; *Terry v. Huntington*, Hard. 480; *Bushell's Case*, 1 Mod. 119; *Gwinne v. Pool*, Lutw. 290; *Ackerly v. Parkinson*, 3 Maule & S. 411; *Garnett v. Ferrand*, 6 B. & C. 611;

*Miller v. Hope*, 2 Shaw 125; *Dicas v. Lord Brougham*, 6 C. & P. 249; *Houlden v. Smith*, 14 Ad. & El. (N. S.) 841, 19 L. J. Q. B. 170; *Ward v. Freeman*, 2 Ir. C. L. Rep. 460; *Kemp v. Neville*, 10 C. B. (N. S.) 528; *Scott v. Stansfield*, 3 L. R. Ex. 220; *Lowther v. Earl of Radnor*, 8 East 118; *Pike v. Carter*, 8 Bing. 78; *Basten v. Carew*, 3 B. & C. 652; *Holroyd v. Breare*, 2 B. & Ald. 478; *Fawcett v. Fowles*, 7 B. & C. 894; *Yates v. Lansing*, 5 Johns. (N. Y.) 282, 9 Id. 395, 6 Am. Dec. 290;

case, the officer is called upon by law to exercise *his judgment* in the matter, and the law holds his duty to the individual to be

*Lange v. Benedict*, 78 N. Y. 12, 29 Am. Rep. 80; *Phelps v. Still*, 1 Day (Conn.) 815; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 785; *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438; *Clarke v. May*, 2 Gray (Mass.) 410, 61 Am. Dec. 470; *Ela v. Smith*, 5 Gray (Mass.) 186, 66 Am. Dec. 356; *Barkeloo v. Randall*, 4 Blackf. (Ind.) 476, 83 Am. Dec. 46; *Pratt v. Gardner*, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; *Bailey v. Wiggins*, 5 Harr. (Del.) 462, 60 Am. Dec. 650; *Little v. Moore*, 4 N. J. L. 74, 7 Am. Dec. 574; *Gregory v. Brown*, 4 Bibb. (Ky.) 28, 7 Am. Dec. 731; *McCall v. Cohen*, 16 S. Car. 445, 42 Am. Rep. 641; *Grove v. Van Duyn*, 44 N. J. L. 654, 43 Am. Rep. 412; *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 698; *Rains v. Simpson*, 50 Tex. 495; 82 Am. Rep. 609; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 181; *Reid v. Hood*, 2 Mott & McC. (S. C.) 168, 10 Am. Dec. 583; *Wilson v. Mayor*, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; *Wertheimer v. Howard*, 30 Mo. 420, 77 Am. Dec. 628; *Cunningham v. Bucklin*, 8 Cowen (N. Y.) 178, 18 Am. Dec. 432; *Tompkins v. Sands*, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46; *Butler v. Potter*, 17 Johns. (N. Y.) 145; *Craig v. Burnett*, 82 Ala. 728; *Carter v. Dow*, 16 Wis. 298; *Wall v. Trumbull*, 16 Mich. 228; *Clark v. Holdridge*, 58 Barb. (N. Y.) 61; *Evans v. Foster*, 1 N. H. 374; *Burnham v. Stevens*, 83 N. H. 247; *Ramsey v. Riley*, 18 Ohio 157; *Taylor v. Doremus*, 16 N. J. 473; *Morris v. Carey*, 27 N. J. 877; *Mangold v. Thorpe*, 88 N. J. L. 184; *Hamilton v. Williams*, 26

Ala. 527; *Walker v. Hallock*, 83 Ind. 239; *Morrison v. McDonald*, 21 Me. 550; *Downing v. Herrick*, 47 Me. 462; *Londegan v. Hammer*, 30 Iowa 508; *Fuller v. Gould*, 20 Vt. 643; *East River Gas. L. Co. v. Donnelly*, 93 N. Y. 557; *Steele v. Dunham*, 26 Wis. 898; *Porter v. Haight*, 45 Cal. 631; *Harman v. Brotherson*, 1 Denio (N. Y.) 537; *Palmer v. Lawrence*, 6 Lans. (N. Y.) 282; *Chickering v. Robinson*, 8 Cush. (Mass.) 543; *Way v. Townsend*, 4 Allen (Mass.) 114; *Millard v. Jenkins*, 9 Wend. (N. Y.) 298; *Wickware v. Bryan*, 11 Wend. 545; *Raymond v. Bolles*, 11 Cush. (Mass.) 315; *Lillienthal v. Campbell*, 22 La. Ann. 600; *Pickett v. Wallace*, 57 Cal. 555; *Bullett v. Clement*, 16 B. Mon. (Ky.) 193; *Walker v. Floyd*, 4 Bibb. (Ky.) 237; *Lining v. Bentham*, 2 Bay (S. C.) 1; *State v. Johnson*, 2 Bay (S. C.) 385; *Brodie v. Rutledge*, 2 Bay 69; *Holcomb v. Cornish*, 8 Conn. 375; *Blythe v. Thompkins*, 2 Abb. (N. Y.) Pr. 468; *Evarts v. Kiehl*, 102 N. Y. 296; *White v. Morse*, 189 Mass. 162; *Connelly v. Woods*, 81 Kans. 359; *Hughes v. McCoy*, — Col. —, 19 Pac. Rep. 674; *Merwin v. Rogers*, 1 N. Y. Sup. Rep. 211, 2 *Id.* 396; *Irion v. Lewis*, 56 Ala. 190; *Harrison v. Clark*, 4 Hun (N. Y.) 635; *Clark v. Spicer*, 6 Kans. 440; *Garfield v. Douglass*, 23 Ill. 100, 74 Am. Dec. 137; *Kennedy v. Terrill*, Hard. (Ky.) 490; *Johnson v. Tompkins*, 1 Bald. (U. S. C. C.) 571; *Inos v. Winspear*, 18 Cal. 397; *Flack v. Harrington*, Breese 165, 12 Am. Dec. 170; *Revill v. Pettit*, 3 Metc. (Ky.) 814; *Terrall v. Tinney*, 20 La. Ann. 444; *Spencer v. Perry*, 17 Me. 413; *Sullivan v. Jones*, 2 Gray (Mass.) 570; *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Jones v.*

performed when he has exercised it, however erroneous or disastrous in its consequences it may appear either to the party or to others.

A number of reasons, any one of them sufficient, have been advanced in support of this rule. Thus it is said of the judge: "His doing justice as between particular individuals, when they have a controversy before him, is not the end and object which were in view when his court was created, and he was selected to preside over or sit in it. Courts are created on public grounds; they are to do justice as between suitors, to the end that peace and order may prevail in the political society, and that rights may be protected and preserved. The duty is public, and the end to be accomplished is public; the individual advantage or loss results from the proper and thorough or improper and imperfect performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice as between individuals, he may be called to account by the State in such form and before such tribunal as the law may have provided. But as the duty neglected is not a duty to the individual, civil redress, as for an individual injury, is not admissible."<sup>1</sup>

§ 620. **Same Subject—Other Reasons.**—Other and very potent reasons are found in the requirements of the public policy. Thus it is said:

"1. The necessary result of the liability would be to occupy

Hughes, 5 S. & R. (Penn.) 298, 9 Am. Dec. 864; Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102; Adkins v. Brewer, 8 Cow. (N. Y.) 206, 15 Am. Dec. 264; Kelly v. Rembert, Harp. L. 65, 18 Am. Dec. 648; Bissell v. Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Everston v. Sutton, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217; Rogers v. Mulliner, 6 Wend. (N. Y.) 597, 23 Am. Dec. 546; State v. Flinn, 8 Blackf. (Ind.) 72, 23 Am. Dec. 880; Stewart v. Cooley, 23 Minn. 347, 23 Am. Rep. 690; Doherty v. Munson, 127 Mass. 495; Truesdell v. Combs, 33 Ohio St. 186; Jones v. Brown, 54

Iowa 74, 37 Am. Rep. 185; Bell v. McKinney, 63 Miss. 187; Heard v. Harris, 68 Ala. 43; Bocock v. Cochran, 32 Hun (N. Y.) 521; Johnston v. Moorman, 80 Va. 131; Ambler v. Church, 1 Root (Conn.) 211; Wilcox v. Williamson, 61 Miss. 810; Mills v. Collett, 6 Bing. 85; Woodruff v. Stewart, 63 Ala. 206; Cooke v. Bangs, 31 Fed. Rep. 640; Kennedy v. Barnett, 64 Penn. St. 141; Ross v. Griffin, 53 Mich. 5; Borden v. State, 11 Ark. 519, 54 Am. Dec. 217; Elmore v. Overton, 104 Ind. 848, 54 Am. Rep. 848.

<sup>1</sup> Cooley on Torts (1st ed.) 830.

the judge's time and mind with the defense of his own interests, when he should be giving them up wholly to his public duties, thereby defeating to some extent the very purpose for which his office was created.

2. The effect of putting the judge on his defense as a wrong-doer necessarily is to lower the estimation in which his office is held by the public, and any adjudication against him lessens the weight of his subsequent decisions. \* \* \*

3. The civil responsibility of the judge would often be an incentive to dishonest instead of honest judgments, and would invite him to consult public opinion and public prejudices when he ought to be wholly above and uninfluenced by them. \* \* \*

4. Such civil responsibility would constitute a serious obstruction to justice, in that it would render essential a large increase in the judicial force, not only as it would multiply litigation, but as it would open each case to endless controversy. \* \* \* If one judge can be tried for his judgment, the one who presides on the trial may also be tried for his, and thus the process may go on until it becomes intolerable.

5. But where the judge is really deserving of condemnation, a prosecution at the instance of the State is a much more effectual method of bringing him to account than the private suit. \* \* \* It may require the facts of many cases to establish the fault; it may be necessary to show the official action for years. Where an officer is impeached, the whole official career is or may be gone into; in that case one delinquency after another is perhaps shown—each tends to characterize the other, and the whole will enable the triers to form a just opinion of the official integrity. But in a private suit the party would be confined to the facts of his own case; it is against inflexible rules that one man should be allowed to base a recovery for his own benefit on a wrong done to another, and could it be permitted, the person first wronged, and whose right to redress would be as complete as any, would lose his advantage by the very fact that he stood first in the line of injured persons." To these is to be added another:

6. Judicial offices would never be accepted by any man of standing, reputation or financial worth, "if, at the peril of his



fortune, he must justify his judgments to the satisfaction of a jury summoned by a dissatisfied litigant to review them.”<sup>1</sup>

“Whenever, therefore,” continues the distinguished judge whose language has been quoted, “the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State, and the peace and happiness of society; that if he shall fail in a faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer.”<sup>2</sup>

§ 621. **This Immunity from Liability is not affected by Motives.**—This immunity of judicial officers from civil liability is not affected by the motives with which they are alleged to have performed their duties. If the officer be in fact corrupt, the public has its remedy, but the defeated suitor cannot be permitted to obtain redress against the judge by alleging that the judgment against him was the result of corrupt or malicious motives.<sup>3</sup>

<sup>1</sup> Cooley on Torts (1st ed.) 406-408.

<sup>2</sup> Cooley on Torts (1st ed.) 408-409, quoted and approved in *Hughes v. McCoy*, — Colo. —, 19 Pac. Rep. 674; *Johnston v. Moorman*, 80 Va. 181, 189;

<sup>3</sup> *Bradley v. Fisher*, 18 Wall. (U. S.) 335; *Fray v. Blackburn*, 8 Best & Smith, 576; *Floyd v. Barker*, 12 Coke 25; *Rains v. Simpson*, 50 Tex. 495, 32 Am. Rep. 609; *Weaver v. Devendorf*, 8 Denio (N. Y.) 117; *Pratt v. Gardner*, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; *Cunningham v. Bucklin*, 8 Cowen (N. Y.) 178, 18 Am. Dec. 432; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131;

*Johnston v. Moorman*, 80 Va. 181; *Henke v. McCord*, 55 Iowa 378; *Jones v. Brown*, 54 Iowa 74, 37 Am. Rep. 185; *Green v. Talbot*, 36 Iowa 499; *Wasson v. Mitchell*, 18 Iowa 153; *Merwin v. Rogers*, 1 N. Y. Sup. Rep. 211, 2 *Id.* 396; *Hughes v. McCoy*, — Colo. —, 19 Pac. Rep. 674; *Irlon v. Lewis*, 56 Ala. 190; *Heard v. Harris*, 68 Ala. 43; *Evans v. Foster*, 1 N. H. 877; 2 *Saunds Pl. & Ex.* 613; *Barnardiston v. Soame*, 1 East. 566, n.; *Stowball v. Ansell*, Comb. 116; *Garnett v. Ferrard*, 6 B. & C. 611; *Dicas v. Lord Brougham*, 6 C. & P. 249; *Brittain v. Kinnaird*, 1 Brod. & Bing.

The reasons for this rule have been well stated by Mr. Justice FIELD as follows: "Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in the courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often creates in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case, is he apt to complain of the judgment against him, and, from complaints of the judgment, to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human nature, this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts, would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every

441; *Barhyte v. Shepherd*, 85 N. Y. 242; *Wilson v. Mayor*, 1 Denio (N. Y.) 599, 48 Am. Dec. 719; *Steele v. Dunham*, 26 Wis. 896; *Yates v. Lansing*,

5 Johns. (N. Y.) 282, 9 *Id.* 414, 6 Am. Dec. 290; *Jordan v. Hanson*, 49 N. H. 202, 6 Am. Rep. 508; *Little v. Moore*, 4 N. J. L. 74, 7 Am. Dec. 574.

litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he decided as he did with judicial integrity; and the second judge would be subjected to a similar burden as he in his turn might also be held amenable by the losing party.”<sup>1</sup>

§ 622. **This Immunity extends to Judicial Officers of all Grades.**—This exemption from civil action extends to every judicial officer of whatever grade,—from the highest judge in the land to the humblest justice who tries petty cases.<sup>2</sup> Whoever is invested by law with judicial powers, whether of high or low degree, cannot be called to account to the private individual for his judicial acts within his jurisdiction, although, as has been seen, the aggrieved party may allege that the act was corrupt or malicious.<sup>3</sup> For such acts, the officer must account only to his conscience and the State.

§ 623. **Officer must have acted officially.**—It is indispensable to this exemption that the officer shall have assumed to act as such by virtue of the authority vested in him by law.<sup>4</sup> For

<sup>1</sup> In *Bradley v. Fisher*, 18 Wall. (U. S.) 835.

<sup>2</sup> *Garnett v. Ferrand*, 6 B. & C. 611; *Butler v. Potter*, 17 Johns. (N. Y.) 145; *Pratt v. Gardner*, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; *Carter v. Dow*, 16 Wis. 298; *Wall v. Trumbull*, 16 Mich. 228; *Waldron v. Berry*, 51 N. H. 136; *Wilson v. Mayor*, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; *Cole v. Trustees*, 27 Barb. (N. Y.) 218; *Kavanagh v. Brooklyn*, 38 Barb. (N. Y.) 232; *Mills v. Brooklyn*, 32 N. Y. 489; *Weaver v. Devendorf*, 3 Denio (N. Y.) 117; *Johnston v. Moorman*, 80 Va. 181; *Irlon v. Lewis*, 56 Ala. 190; *Merwin v. Rogers*, 1 N. Y. Sup. Rep. 211, 2 *Id.* 896; *Ayers v. Russell*, 3 N. Y. Sup. Rep. 338; *Rains v. Simpson*, 50 Tex. 495, 32 Am. Rep. 609; *Allec v. Reece*, 39 Fed. Rep. 841.

<sup>3</sup> There are, in some of the cases,

*dicta* to the effect that inferior judicial official officers and magistrates may be held liable for the judicial acts, even though acting within their jurisdiction, if they were actuated by corrupt or malicious motives, but they are not sustained by the authorities. As is said in *Irlon v. Lewis*, 56 Ala. 190, 196. “In support of such action, even when the judicial error complained of is corrupt or malicious, few authorities can be found.”

See also *Johnston v. Moorman*, 80 Va. 181; *Merwin v. Rogers*, 2 N. Y. Sup. Rep. 896; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131.

The subject is also ably and fully discussed in *Mangold v. Thorpe*, 33 N. J. L. 184.

<sup>4</sup> *Lange v. Benedict*, 73 N. Y. 12, 39 Am. Rep. 80.

his own private wrongs he is liable like any other individual, and his official character affords him no protection.

§ 624. *Jurisdiction essential to this Immunity.*—So in order that there shall be this immunity from civil action, the act done by the officer must have been done in a matter within his jurisdiction.<sup>1</sup> By this is meant, when the officer assumed to do the act as a judge, that he had judicial jurisdiction both of the person or thing, if any, acted upon, and of the subject-matter in respect of which it was done.<sup>2</sup>

§ 625. *Jurisdiction defined—Jurisdiction of the Person, of the Subject-Matter, of the Res.*—Jurisdiction in a judge has been defined as the authority of law to act officially in the matter then in hand.<sup>3</sup>

*Jurisdiction of the person* exists when the person acted upon is before the judge, either constructively or in fact, by reason of the service upon him of appropriate process duly issued and executed or by his voluntary appearance.<sup>4</sup>

*Jurisdiction of the subject-matter* exists when the officer possesses the power lawfully conferred to deal with the general subject involved in the action.<sup>5</sup>

Jurisdiction of the subject-matter does not mean that the officer has by the appropriate and proper procedure brought the particular matter in question within his jurisdiction,—whether he has done so or not is often the point most difficult to deter-

<sup>1</sup> See generally cases cited in note 1 to § 620, *supra*.

See also *Wright v. Rouss*, 18 Neb. 284; *Estopinal v. Peyroux*, 87 La. Ann. 477; *Truesdell v. Combs*, 88 Ohio St. 186; *Patzack v. Von Gerichten*, 10 Mo. App. 424; *Holtzman v. Robinson*, 2 McAr. (D. C.) 520; *Kibling v. Clark*, 58 Vt. 379; *Hitch v. Lambright*, 66 Ga. 228; *Mangold v. Thorpe*, 88 N. J. L. 134; *Bullett v. Clement*, 16 B. Mon. (Ky.) 193; *Walker v. Floyd*, 4 Bibb. (Ky.) 237; *Lining v. Bentham*, 2 Bay (S. C.) 1. *State v. Johnson*, 2 Bay 385; *Reid v. Hood*, 2 Nott. & McC. (S. C.) 168, 10 Am.

Dec. 582; *Holcomb v. Cornish*, 8 Conn. 375; *Blythe v. Thompson*, 2 Abb. (N. Y.) Pr. 468; *Downing v. Herrick*, 47 Me. 463; *Gregory v. Brown*, 4 Bibb. (Ky.) 28, 7 Am. Dec. 731; *Little v. Moore*, 4 N. J. L. 74, 7 Am. Dec. 574; *Chickering v. Robinson*, 3 Oush. (Mass.) 548.

<sup>2</sup> *Lange v. Benedict*, 78 N. Y. 12, 29 Am. Rep. 80.

<sup>3</sup> *Cooley on Torts* (1st ed.) 417.

<sup>4</sup> *Lange v. Benedict*, 78 N. Y. 12, 29 Am. Rep. 80; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 316.

<sup>5</sup> *Hunt v. Hunt*, 73 N. Y. 217, 28 Am. Rep. 129.

mine;—but it means that he is by law invested with authority to deal with similar cases,—with cases of that class.<sup>1</sup>

*Jurisdiction of the res* is obtained by a seizure under process of court, whereby it is held to abide such order as the court may make concerning it.<sup>2</sup>

§ 626. **Act must be confined within his Jurisdiction.**—And not only must the judge have jurisdiction of the person and the subject-matter, but the act must be confined within that jurisdiction. It must have been done while he was acting as a judge in his judicial capacity and within his jurisdiction.<sup>3</sup> “For,” as has been said, “it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there. Should such an one, rightfully holding a court for the trial of civil actions, order the head of a bystander stricken off, and be obeyed, he would be liable.”<sup>4</sup>

So where a judge of a municipal court was charged with maliciously conspiring with others to institute in his court a malicious prosecution against the plaintiff, it was held that the defendant's judicial character was no defense, for the act of entering into such an agreement was not done in the course of any judicial proceeding, or in the discharge of any judicial function or duty.<sup>5</sup>

§ 627. **Same Subject—When Jurisdiction presumed—Superior and inferior Courts.**—A marked distinction is made by the

<sup>1</sup> By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers or in authority specially conferred.” MILLER, J., in *Cooper v. Reynolds*, 10 Wall. (U. S.) 808, 816.

<sup>2</sup> *Cooper v. Reynolds*, 10 Wall. (U. S.) 808, 817.

<sup>3</sup> *Lange v. Benedict*, 78 N. Y. 12, 29 Am. Rep. 80.

<sup>4</sup> FOLGER, J., in *Lange v. Benedict*, *supra*.

<sup>5</sup> *Stewart v. Cooley*, 28 Minn. 347, 28 Am. Rep. 690. As to this case Judge COOLEY says: “The wrongful act on the part of the judge here must have consisted in the issuing of process; and as to that, he could have had no discretion if the complaint was sufficient, or, if he had, it was a judicial discretion, and to hold him liable by charging some bad motive lying back of it, seems to come directly within the condemnation of *Bradley v. Fisher*, 13 Wall. 385, above referred to.” *Cooley on Torts* (1st ed.) p. 412, note 5.

law between courts of general and superior jurisdiction, and those of limited and inferior jurisdiction. In favor of the former, it is presumed that they have not acted without jurisdiction. Whoever assails them, therefore, on that ground, must be prepared to show wherein the lack of jurisdiction consists.<sup>1</sup>

No such presumption, on the contrary, is indulged in favor of courts whose jurisdiction is limited and inferior. In such a case the jurisdiction must be made to appear,—that is, it must appear by the record itself. If, therefore, the court acquires jurisdiction only in a certain way, or by certain procedure, or upon a certain contingency, this pre-requisite must appear upon the face of the proceedings to have existed in the manner and to the extent required, or the proceedings must fail. Whoever relies upon the judgment of such a court must establish every fact necessary to give it jurisdiction.<sup>2</sup>

This distinction becomes of great importance in determining the liability of the judicial officer who has erroneously assumed jurisdiction, or has erroneously decided that the power to do a certain act is within the jurisdiction conferred upon him. Thus—

§ 628. **Same Subject—Judge of superior Court liable only where there is clear Absence of all Jurisdiction.**—The presumption being that courts of general and superior jurisdiction have not exceeded their authority, it is well settled that the judges of such courts can only be held liable in a civil action in those cases in which there is a clear absence of all jurisdiction whatever.<sup>3</sup> That he merely exceeded his jurisdiction is not enough.<sup>4</sup>

<sup>1</sup> *Lowry v. Erwin*, 6 Rob. (La.) 192, 39 Am. Dec. 556; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439; *Reynolds v. Stansbury*, 20 Ohio 344, 55 Am. Dec. 459.

<sup>2</sup> *Rossiter v. Peck*, 3 Gray (Mass.) 539; *Case v. Woolley*, 6 Dana (Ky.) 17, 33 Am. Dec. 54; *Bloom v. Burdick*, 1 Hill (N. Y.) 180, 37 Am. Dec. 299; *Lowry v. Erwin*, 6 Rob. (La.) 192, 39 Am. Dec. 556; *Levy v. Shur-*

*man*, 6 Ark. 182, 42 Am. Dec. 690; *Gay v. Lloyd*, 1 Greene (Iowa) 78, 46 Am. Dec. 499; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; *Spear v. Carter*, 1 Mich. 19, 48 Am. Dec. 688; *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439; *Reynolds v. Stansbury*, 20 Ohio 344, 55 Am. Dec. 459; *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488.

<sup>3</sup> *Bradley v. Fisher*, 18 Wall. (U. S.) 335; *Randall v. Brigham*, 7 Wall.

<sup>4</sup> *Bradley v. Fisher*, 18 Wall. (U. S.) 335.

§ 629. **Same Subject—Distinction between Absence and Excess of Jurisdiction.**—In the leading case<sup>1</sup> upon this subject in the United States, it is said "A distinction must be observed between excess of jurisdiction, and the clear absence of all jurisdiction over the subject-matter. Where there there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised, are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgment may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration whenever his general jurisdiction over the subject-matter is invoked."

(U. S.) 523; *Calder v. Holket*, 8 Moore 28, 75.

A United States district judge is within this exemption. *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80.

<sup>1</sup> *Bradley v. Fisher*, 13 Wall. (U. S.) 835, 852, per FIELD, J., *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *McCall v. Cohen*, 16 S. C. 445, 43 Am. Rep. 641.

§ 630. **Same Subject—Judge of inferior Court liable where he acts without or in Excess of his Jurisdiction.**—When, however, the question arises in reference to an inferior judge or magistrate a somewhat different rule applies. The judge of a court of inferior or limited jurisdiction, or a justice or magistrate exercising limited and inferior powers, is as free to exercise his judicial judgment or discretion and is as exempt from liability for the exercise of his judicial powers within the limits of his jurisdiction, as the judge of a court of general or superior powers, no matter how mistaken or erroneous his judgment may be,<sup>1</sup> or how corrupt or malicious may be the motives with which it is alleged he was inspired.<sup>2</sup>

<sup>1</sup> *Mangold v. Thorpe*, 38 N. J. L. 184; *Hitch v. Lambright*, 66 Ga. 228; *Irion v. Lewis*, 56 Ala. 190; *Johnston v. Moorman*, 80 Va. 181; *Heard v. Harris*, 68 Ala. 48; *Bell v. McKinney*, 68 Miss. 187; *Abrams v. Carlisle*, 18 S. C. 242; *Walker v. Floyd*, 4 Bibb (Ky.) 237; *Gregory v. Brown*, 4 Bibb 28, 7 Am. Dec. 781; *Bullitt v. Clement*, 16 B. Mon. (Ky.) 198; *Lining v. Bentham*, 2 Bay (S. C.) 1; *State v. Johnson*, 2 Bay 385; *Reid v. Hood*, 2 Nott & McC. (S. C.) 168, 10 Am. Dec. 583; *Downing v. Herrick*, 47 Me. 462; *Little v. Moore*, 4 N. J. L. 74, 7 Am. Dec. 574; *Chickering v. Robinson*, 8 Cush. (Mass.) 543.

A justice is not liable who erroneously dismisses an action for the non-appearance of the plaintiff, *Hitch v. Lambright*, 66 Ga. 228; or who erroneously decides that the circumstances proved are sufficient to authorize him to issue a warrant, *Mangold v. Thorpe*, 38 N. J. L. 184; or for failing to render judgment within the time prescribed by law, *Evarts v. Kiehl*, 102 N. Y. 296; or for issu-

ing an attachment upon an affidavit alleging a debt to be due, although it appeared by the note filed with him that it was not due, *Connelly v. Woods*, 81 Kans. 359; nor for erroneously awarding judgment for costs in a case where he had no authority to do so, *White v. Morse*, 139 Mass. 162; *Downing v. Herrick*, 47 Me. 462. See also *Butler v. Potter*, 17 Johns. (N. Y.) 145; nor for committing slaves as runaways having determined, though erroneously, that they were such, *Bullitt v. Clement*, 16 B. Mon. (Ky.) 198; nor for any other erroneous decision upon a matter within his jurisdiction, *Walker v. Floyd*, 4 Bibb (Ky.) 237; *Holcomb v. Cornish*, 8 Conn. 375; nor for an error of judgment in taking a recognizance on appeal in insufficient form, *Chickering v. Robinson*, 8 Cush. (Mass.) 543; nor for an error in judgment in determining the sufficiency of bail, *Lining v. Bentham*, 2 Bay (S. C.) 1. See also *State v. Johnson*, 2 Bay, 385; nor for erroneously deciding that plaintiff was entitled to

<sup>2</sup> *Mangold v. Thorpe*, 38 N. J. L. 184; *Irion v. Lewis*, 56 Ala. 190; *Merwin v. Rogers*, 1 N. Y. Sup. Rep.

211, 2 *Id.* 396; *Hughes v. McCoy*, — Colo. —, 19 Pac. Rep. 674.



But, on the other hand, if he usurps jurisdiction where by law he has none, or if he acts without jurisdiction of the person or the subject-matter, or if he exceeds the limits of the jurisdiction lawfully conferred upon him, he is held to be liable in damages to the party injured thereby, notwithstanding that he was acting in good faith in the honest endeavor to discharge his duty and with the best of motives.<sup>1</sup>

an immediate execution, *Abrams v. Carlisle*, 18 S. C. 242. See also *Keeler v. Woodard*, 4 Chand. (Wis.) 84; or for erroneously making a writ returnable at a wrong time, *Reid v. Hood*, 2 Nott & McC. (S. C.) 168, 10 Am. Dec. 583; or for erroneously granting a rehearing and altering his previous judgment, *Gregory v. Brown*, 4 Bibb (Ky.) 28, 7 Am. Dec. 781; or for erroneously entering judgment and issuing execution against a defendant upon the confession of judgment by a co-defendant, *Little v. Moore*, 4 N. J. L. 74, 7 Am. Dec. 574; nor for erroneously refusing to grant an appeal, it being a judicial act, *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508 (but otherwise, where it is regarded as a ministerial act, *Tompkins v. Sands*, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46; *Tyler v. Alford*, 83 Me. 530; *Hardison v. Jordan*, Cam. & N. (N. C.) 454;) nor for erroneously entering up judgment and issuing execution before the time limited by law. *Abrams v. Carlisle*; 18 S. C. 242; *Keeler v. Woodard*, 4 Chand. (Wis.) 84.

<sup>1</sup> *Wingate v. Waite*, 6 Mees & Wels. 789; *Houlden v. Smith*, 14 Q. B. 841; *Case of the Marshalsea*, 10 Coke 68; *Groenvelt v. Burwell*, 1 Ld. Raym. 454; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Phelps v. Sill*, 1 Day (Conn.) 315; *Palmer v. Carroll*, 24 N. H. 814; *Craig v. Burnett*, 82 Ala. 728; *Clarke v. May*, 2 Gray (Mass.) 410, 61 Am. Dec. 470; *Piper*

*v. Pearson*, 2 Gray 120, 61 Am. Dec. 438; *Kelly v. Bemis*, 4 Gray 84, 64 Am. Dec. 50; *Hendrick v. Whittemore*, 105 Mass. 28; *Morrill v. Thurston*, 46 Vt. 783; *Carleton v. Taylor*, 50 Vt. 220; *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758; *Holtzman v. Robinson*, 2 McAr. (D. C.) 520.

A justice who, having jurisdiction only to bind over for trial in a higher court, inflicts a penal sentence is liable as a wrong-doer. That he had jurisdiction over the subject-matter of complaint for another purpose, or that he acted in good faith is no defense: *Patzack v. Von Gerichten*, 10 Mo. App. 424; *Bore v. Bush*, 9 Mart. (La.) 1.

A justice of the peace has no authority to commit a person to prison for non-payment of a fine where the judgment imposing the fine does not provide for imprisonment, and he is liable in damages to the person so committed: *Lanpher v. Dewell*, 56 Iowa 158.

A justice of the peace who, without any reason or probable cause, causes another to be arrested and imprisoned is liable therefor. *Kelly v. Moore*, 51 Ala. 364; *Johnson v. Tompkins*, 1 Bald. (U. S. C. C.) 571.

A justice of the peace is liable where he issues an attachment, without jurisdiction: *Wright v. Rouse*, 18 Neb. 284, or causes the arrest of a person upon a complaint not charging an offence against any one; *Truedell v. Combs*, 38 Ohio St. 186; *Est-*

This rule and the reasons for it are well stated in a leading case in Massachusetts. There the defendant, a justice of the peace of the county of Middlesex, had assumed jurisdiction of an offense of which the police court of the city of Lowell had by statute exclusive jurisdiction. In the course of the trial of the case, the defendant committed the plaintiff for contempt in refusing to testify. The defendant had authority to so commit the

pinal *v. Peyroux*, 37 La. Ann. 477, or who issues an execution upon a void judgment; *Inos v. Winspear*, 18 Cal. 397; or who acts in a case, committing to prison, where by law he must associate another with him: *Revill v. Pettit*, 3 Metc. (Ky.) 814. To like effect, *Kelly v. Rembert*, Harp. (S. C.) L. 65, 18 Am. Dec. 648; or inflicts punishment under a repealed or unconstitutional statute: *Ely v. Thompson*, 3 A. K. Marsh (Ky.) 70; *Kelly v. Bemis*, 4 Gray 83, 64 Am. Dec. 50; or causes to be seized by process issued by him the property of another than a party to the suit: *Terrail v. Tinney*, 20 La. Ann. 444; or proceeds to render judgment and issue execution after the cause has been discontinued by irregular adjournment: *Spencer v. Perry*, 17 Me. 418; or who issues an execution for the arrest of a party in a case in which the law prohibits such arrest: *Sullivan v. Jones*, 2 Gray (Mass.) 570. (See this case distinguished from *White v. Morse*, 139 Mass. 163); or who refuses to take proper and sufficient bail, and causes the party to be imprisoned: *Guenther v. Whiteacre*, 24 Mich. 504; or who issues a warrant of arrest officiously without complaint or oath or personal knowledge that a crime has been committed: *Flack v. Harrington*, Breese, 165, 12 Am. Dec. 170; or who commits a witness for contempt in a cause in which he had no jurisdiction: *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438; or which had

previously been concluded: *Clarke v. May*, 2 Gray (Mass.) 410, 61 Am. Dec. 470; or who causes an arrest upon an insufficient warrant. *Blythe v. Tompkins*, 2 Abb. (N. Y.) Pr. 468; or who issues a search warrant without the preliminary requisites, or, if it be general in form, *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; or who issues an attachment without proof of an essential prerequisite: *Adkins v. Brewer*, 3 Cowen (N. Y.) 206, 15 Am. Dec. 264; or who issues a warrant under a statute which does not apply to the case: *Evertson v. Sutton*, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217; or who issues a warrant without the required complaint in writing: *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102; or who causes an arrest for an offense known to have been committed outside of the State: *Miller v. Grice*, 2 Rich. (S. C.) L. 27, 44 Am. Dec. 271; or who commits a prisoner upon a complaint showing on its face that the offense charged is barred by the statute of limitations: *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758; or who surrenders a principal to his bail in a case where no such surrender is authorized by law: *Morrill v. Thurston*, 46 Vt. 732; or who issues a warrant, causes the arrest, tries, convicts and sentences a party after his term of office had expired, though the justice was in good faith ignorant of that fact: *Grace v. Teague*, — Me. —, 18 Atl. Rep. 269.

plaintiff if he had jurisdiction of the offense, but it was held that, having no jurisdiction of the offense, the defendant had no power to commit, this power being merely incidental to the authority to try. In giving the opinion of the court,<sup>1</sup> BIGELOW, J., said : "The decision of this case depends on the familiar and well settled rule concerning the liability of courts and magistrates, exercising an inferior and limited jurisdiction, for acts done by them, or by their authority, under color of legal proceedings. One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice, and at the same time to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end, the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive.

But, on the other hand, if they act without any jurisdiction over the subject-matter, or if, having cognizance of a cause, they are guilty of an excess of jurisdiction, they are liable in damages to the party injured by such unauthorized acts. In all cases, therefore, where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the single inquiry is whether he has acted without any jurisdiction over the subject-matter, or has been guilty of an excess of jurisdiction. By this simple test, his legal liability will at once be determined.<sup>2</sup> If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non iudice* and void ; and if he attempts to enforce any process founded on any judgment, sentence or conviction in such case, he thereby becomes a trespasser."<sup>3</sup>

§ 631. **Same Subject—Liability for acting under void Statute.**  
—This rule has been carried to the extreme of holding an infe-

<sup>1</sup> Piper v. Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438.

<sup>2</sup> Citing 1 Chitty Pl. (8th Am. ed.) 90, 209-213; Beaurain v. Scott, 8 Camp. 388; Ackerley v. Parkinson, 8 Maule & Sel. 425, 428; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am.

Dec. 225; Bigelow v. Stearns, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; Allen v. Gray, 11 Conn. 95.

<sup>3</sup> Citing 1 Chitty Pl. 210; Bigelow v. Stearns, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; Clarke v. May, 2 Gray (Mass.) 410, 61 Am. Dec. 470.

rior magistrate liable where he has in good faith acted under a statute afterwards held unconstitutional;<sup>1</sup> but the severity of this rule has called forth forcible dissent, inasmuch as the magistrate, when called upon to act under it, is obliged impliedly if not expressly to pass upon its validity, thus clearly exercising judicial powers, for an error in which he ought not to be held liable.<sup>2</sup>

<sup>1</sup> *Kelly v. Bemis*, 4 Gray (Mass.) 83, 64 Am. Dec. 50; *Ely v. Thompson*, 3 A. K. Marsh (Ky.) 70.

In the case first cited, BIGELOW, J., said: "The defendant in the present case seeks to justify the tort charged in the declaration by proof that he acted as a magistrate in the performance of certain duties under statute of 1852, c. 822, sec. 14. But that section of the statute has been adjudged to be unconstitutional and void: *Fisher v. McGirr*, 1 Gray 1, (61 Am. Dec. 381.) It therefore conferred no authority or jurisdiction upon magistrates. Under a government of limited and defined powers, where, by the provisions of the organic law, the rights and duties of the several departments of the government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others. The defendant could derive no power or jurisdiction from a void statute. He therefore acted without any jurisdiction; and upon familiar and well-settled principles is liable in this action: *Fisher v. McGirr*, *supra*; *Piper v. Pearson*, 3 Gray 120 (61 Am. Dec. 438); *Clarke v. May*, *Id.* 410 (61 Am. Dec. 470)."

See also *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718; *Astrom v. Hammond*, 8 McLean (U. S. C. C.) 107; *Woolsey v. Commercial Bank*, 6 McLean 142; *Osborn v. Bank*, 9 Wheat.

(U. S.) 788, 868; *Meagher v. Storey County*, 5 Nev. 244; *Campbell v. Sherman*, 35 Wis. 108.

<sup>2</sup> In speaking of this case in *Henke v. McCord*, 55 Iowa 378, 385—a case involving the liability of a justice who had proceeded under an ordinance which the court now declares void—DAY, J. said: "This is the only case which we have found that goes to this extreme length, and the doctrine, notwithstanding the learning and ability of the court by which it was pronounced, does not meet our approval. When the information was presented to the justice in this case all the matters pertaining to his right to issue a warrant were properly brought within his jurisdiction. He was called upon to exercise judicial powers. If the ordinance was valid, it was his duty to issue a warrant. A refusal to do so would be a disregard of the obligations imposed upon him by his office. He could justify his refusal only upon the ground that the ordinance was invalid. He was thus called upon to pass judicially upon the validity of the ordinance. In making this determination he acted strictly within his jurisdiction. An erroneous decision upon the subject is a mere mistake in judgment for which he ought not to be held responsible. If a judge of a circuit or a district court had committed a like error, it would hardly be claimed that he would be liable to a civil action. There is neither reason nor justice, it

§ 632. **Same Subject—Limitations on Liability of inferior Officer for Error in assuming doubtful Jurisdiction.**—Under the strict rule above referred to, as will be seen from the cases cited in the note, it is held that the justice or other inferior magistrate is liable for a jurisdiction wrongfully assumed or for proceeding without jurisdiction, even though he was called upon to decide whether the preliminary facts, complaint or affidavit were sufficient to confer jurisdiction and acted in good faith in deciding that they were.<sup>1</sup>

This doctrine has, however, met with much forcible and reasonable dissent in recent times. There are undoubtedly cases in which the rule stated is properly applicable, as where jurisdiction is assumed or exercised without even the color of authority, or beyond limits which are clearly and unambiguously defined, or in the face of express statutory prohibitions. But where, on the other hand, the officer has jurisdiction of the subject-matter, *i. e.*, of that class of cases, but the question of jurisdiction in that particular case depends upon some question for judicial determination, as upon the validity or proper construction of a doubtful statute, or upon the technical legal sufficiency of the averments of a preliminary complaint or affidavit, or the existence of jurisdictional facts,—questions upon which he is bound to decide, and questions, too, upon which, as is often the case, the learned judges of the courts of last resort are unable to agree,—it certainly seems not only impolitic, but a violation of the well established principle governing the liability of judicial officers, to hold the inferior officer liable, at any rate where he has acted in good faith and with an honest endeavor to do the right.<sup>2</sup>

seems to us, in holding a justice of the peace liable to a civil action for such an error in judgment."

See also *Sessums v. Botts*, 84 Tex. 334; *State v. McNally*, 84 Me. 210, 56 Am. Dec. 650.

<sup>1</sup> It is said to be no protection that the inferior court in good faith decides that the law confers jurisdiction. *Wingate v. Waite*, 16 M. & W. 789; *Houlden v. Smith*, 14 Q. B. 841; *Piper v. Pearson*, 2 Gray (Mass.) 120,

61 Am. Dec. 438. *Cooley on Torts* (3d ed.) 491, note 1.

See also *Truesdell v. Combs*, 88 Ohio St. 186; *Estopinal v. Peyroux*, 87 La. Ann. 477; *Wright v. Rouss*, 18 Neb. 234; *Adkins v. Brewer*, 8 Cowen (N. Y.) 206, 15 Am. Dec. 264; *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102; *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200.

<sup>2</sup> A justice or other magistrate acts judicially in deciding whether a

Indeed, it is difficult to see why in this, as in any other case of judicial action, the question of immunity should not be decided regardless of the motive alleged. Such, as has been seen, is the rule applied to judges of superior courts, and the same rule has in recent cases been extended to the case of inferior magistrates.

Thus in an action against a justice of the peace for an unlawful imprisonment, the Court of Errors and Appeals of New Jersey held him not liable, though he had erroneously issued a warrant, by virtue of which the plaintiff was arrested, upon a complaint which stated no offense known to the statute.<sup>1</sup> After reviewing the cases, BEASLEY, C. J., says "that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers, is that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put *at least colorably* under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong.

But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable

complaint or affidavit is sufficient to confer jurisdiction, and is not liable for an error in this respect. *Bocock v. Cochran*, 83 Hun (N. Y.) 531; *Harrison v. Clark*, 4 Hun 685; *Stewart v. Hawley*, 21 Wend. (N. Y.) 552; *Harman v. Brotherson*, 1 Denio (N. Y.) 537; *Clark v. Holdridge*, 53 Barb. (N. Y.) 61; *Kenner v. Morrison*, 13 Hun 204; *Clark v. Spicer*, 6 Kans. 440.

<sup>1</sup> *Grove v. Van Duyn*, 44 N. J. L. 654, 42 Am. Rep. 648, n.

To the same effect are *McCall v. Cohen*, 16 S. C. 445, 42 Am. Rep. 641; *Henke v. McCord*, 55 Iowa 378; *Maguire v. Hughes*, 18 La. Ann. 281;

see also, per MARCY, J., in *Savacool v. Boughton*, 5 Wend. 173, 21 Am. Dec. 181; *Lange v. Benedict*, 73 N. Y. 12, 20 Am. Rep. 80, is an interesting and valuable case upon the general question.

The same principle was also applied in *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508, where a justice of the peace was held not liable for erroneously refusing to grant an appeal, it being a question for him to determine whether the right existed, and, if so, whether it was demanded in due time and form.

See also *Bailey v. Wiggins*, 5 Harr. (Del.) 462, 60 Am. Dec. 650.

one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically wilful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression."

§ 683. **Same Subject—Reasons assigned for this Distinction.**—"Why the law should protect the one judge and not the other," says Judge COOLEY,<sup>1</sup> "and why if it protects one only, it should be the very one who, from his higher position and presumed superior learning and ability, ought to be most free from error, are questions of which the following may be suggested as the solution:

The inferior judicial officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so. Moreover, in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court which, under the law, appears doubtful. On the other hand, when a grant of general jurisdiction is made, a presumption accompanies it that it is to be exercised generally until an exception appears which is clearly beyond its intent; its very nature is such as to confer upon the officer entrusted with it more liberty of action in deciding upon his powers than could arise from a grant expressly confined within narrow limits, and the law would be inconsistent with itself if it were not to protect him in the exercise of this judgment. Moreover, for him to decline to exercise an authority because of the existence of a question, when his own judgment favored it,

<sup>1</sup> Cooley on Torts, 2d ed. 491.

would be to that extent to decline the performance of duty, and measurably to defeat the purpose of the law creating his office; for it cannot be supposed that this contemplated that the judge should act officially as though all presumptions opposed his authority when the fact was directly the contrary."

§ 634. **Same Subject—Officer not liable when Jurisdiction is assumed through Mistake of Fact.**—But, even under the more stringent rule, judicial officers cannot be held liable for acting without jurisdiction, or for exceeding the limits of their authority, where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to a particular case of which the officer had neither knowledge nor the means of knowledge. In other words, if the want of jurisdiction over a particular case is caused by matters of fact, it must be made to appear that they were known, or ought to have been known, to the officer, in order to hold him liable for acts done without jurisdiction. Otherwise the maxim *Ignorantia facti excusat* applies.<sup>1</sup>

§ 635. **Judicial Officer is liable when he acts ministerially.**—But a judicial officer may be and often is called upon to perform duties which are ministerial in their nature rather than judicial; and when so acting he is liable like any other ministerial officer and his judicial character affords him no protection.\*

Thus a justice of the peace acts ministerially and is liable for negligence in entering up a judgment,<sup>2</sup> or in making return to an appeal,<sup>3</sup> or in entering a stay of execution.<sup>4</sup> So, it has been held, that he acts ministerially in approving an appeal bond, or in

<sup>1</sup> Clarke v. May, 2 Gray (Mass.) 410, 41 Am. Dec. 470; Vaughn v. Congdon, 56 Vt. 111, 48 Am. Rep. 758; Pike v. Carter, 8 Bing. 78, a. c. 10 Moore, 876; Lowther v. Earl of Radnor, 8 East 118, Calder v. Halket, 8 Moo. P. C. C. 28.

<sup>2</sup> Howe v. Mason, 14 Iowa 510; Ambler v. Church, 1 Root (Conn.) 211; Christopher v. Van Liew, 57 Barb. (N. Y.) 17; Houghton v. Swarthout, 1 Denio (N. Y.) 589; Kerns v. Schoonmaker, 4 Ohio 881, 23 Am. Dec. 757;

Briggs v. Wardwell, 10 Mass. 356; Taylor v. Doremus, 1 Harr. (N. J.) 478; Spears v. Smith, 9 Lea (Tenn.) 483; McTeer v. Lebow, 85 Tenn. 121; Pike v. Megoun, 44 Mo. 491; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 180.

<sup>3</sup> Christopher v. Van Liew, 57 Barb. (N. Y.) 17.

<sup>4</sup> Houghton v. Swarthout, 1 Denio (N. Y.) 589.

<sup>5</sup> Kerns v. Schoonmaker, 4 Ohio 881, 23 Am. Dec. 757.



refusing to do so, and if he corruptly refuses to approve such a bond, he is liable to an action on the case.<sup>1</sup> So, it is held, that a justice acts ministerially in issuing executions; and if in doing so he acts irregularly or officiously, he is liable; though if he had committed the irregularity as the agent of the party, and was acting within his jurisdiction, he would be excused.<sup>2</sup>

The issuing of executions has, however, been also held to be a judicial and not a ministerial act, and the justice, therefore, not liable for a loss occasioned by his failure to make the writ returnable in the proper time.<sup>3</sup>

An inferior judicial officer has been said to be liable for accepting an insufficient guardian's bond only if he acted wilfully or maliciously,<sup>4</sup> and in another case it was said that to render a judicial officer liable when acting ministerially he must be shown to have acted wilfully, corruptly or maliciously.<sup>5</sup>

## II.

### QUASI-JUDICIAL OFFICERS.

§ 636. *In general.*—The power and duty to exercise judgment and discretion is not conferred upon those officers alone who sit as judges in courts. There is still a large class of officers whose duties lie wholly outside of the domain of courts of justice, or concern the business of courts only incidentally or occasionally, and who are yet called upon by law to exercise, for the benefit of the public or of individuals, powers very nearly akin to those of judges in the courts.

<sup>1</sup> *Tompkins v. Sands*, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46. See also *Tyler v. Alford*, 88 Me. 530; *Hardison v. Jordan*, Cam. & N. (N. C.) 454. *Contra*, *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508.

<sup>2</sup> *Percival v. Jones*, 2 Johns. (N. Y.) Cases 49; *Taylor v. Trask*, 7 Cowen (N. Y.) 249; *Liable for issuing it too soon*: *Briggs v. Wardwell*, 10 Mass. 356.

<sup>3</sup> *Wertheimer v. Howard*, 80 Mo. 420, 77 Am. Dec. 628. The court

did not consider the question free from doubt saying that their inclination was "to hold all his acts, which from the beginning to the end of a suit the law requires him to perform, as judicial, and involving only that responsibility which attends all judicial officers."

<sup>4</sup> *Boyd v. Ferris*, 10 Humph. (Tenn.) 406; *Spears v. Smith*, 9 Lea (Tenn.) 488; *McTeer v. Lebow*, 85 Tenn. 121.

<sup>5</sup> *Tompkins v. Sands*, *supra*.

The powers conferred upon this class of officers are often, to distinguish them from those of judges proper, termed *quasi-judicial* or discretionary.

§ 637. **Quasi-Judicial Functions defined.**—“*Quasi-judicial functions*,” says Mr. Bishop,<sup>1</sup> “are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi-judicial*.”

§ 638. **Quasi-Judicial Officer exempt from civil Liability for his official Actions.**—The same reasons of private interest and public policy which operate to render the judicial officer exempt from civil liability for his judicial acts within his jurisdiction apply to the *quasi-judicial* officer as well, and it is well settled that the *quasi-judicial* officer can not be called upon to respond in damages to the private individual for the honest exercise of his judgment within his jurisdiction however erroneous or misguided his judgment may be.<sup>2</sup>

The name applied to the office or the officer is immaterial. The question depends in each case upon the character of the act.<sup>3</sup> If it be judicial or *quasi-judicial* in its nature, the officer acts judicially and is exempt.

Neither is it material that the officer usually or often acts ministerially, in those cases in which he does act judicially he is, nevertheless, exempt.<sup>4</sup>

§ 639. **Same Subject—To what Officers this Rule applies.**—This rule extends to the protection of *arbitrators* in their decision upon the controversy submitted to them; <sup>5</sup> *jurors* in their delib-

<sup>1</sup> Bishop on Non-Contract Law, §§ 785, 786.

<sup>2</sup> See the cases cited in detail in the following section.

<sup>3</sup> Wall v. Trumbull, 16 Mich. 223; Henderson v. Smith, 26 W. Va. 829, 53 Am. Rep. 189.

<sup>4</sup> Wall v. Trumbull, 16 Mich. 223;

Jenkins v. Waldron, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; Weaver v. Devendorf, 3 Denio (N. Y.) 117; Henderson v. Smith, 26 W. Va. 829, 53 Am. Rep. 189.

<sup>5</sup> Jones v. Brown, 54 Iowa, 74, 87 Am. Rep. 185; Pappa v. Rose, L. R. 7 C. P. 32, 1 Eng. Rep. 87; a. a.

erations and verdicts; <sup>1</sup> *assessors* in the valuation of property for taxation; <sup>2</sup> *town-boards* of equalization in determining the value of lands; <sup>3</sup> *commissioners* appointed to determine and award damages for property taken by virtue of the right of eminent domain; <sup>4</sup> *highway officers* authorized to lay out, alter or discontinue highways, <sup>5</sup> or to decide upon exemption from highway taxes, <sup>6</sup> or to exercise their judgment as to the making or repairing of highways, <sup>7</sup> or the construction of ditches for their drainage, <sup>8</sup> or the building of dams; <sup>9</sup> *municipal boards* authorized to hear and determine claims; <sup>10</sup> *collectors of customs* in the sale of perishable property; <sup>11</sup> *school officers* in deciding upon the removal of a teacher, <sup>12</sup> or the expulsion of a scholar; <sup>13</sup> *aldermen*

on appeal L. R. 7 C. P. 535, 8 Eng. Rep. 875.

<sup>1</sup> *Turpen v. Booth*, 56 Cal. 65, 38 Am. Rep. 48; *Hunter v. Mathis*, 40 Ind. 356.

<sup>2</sup> *Dillingham v. Snow*, 5 Mass. 547; *Easton v. Calendar*, 11 Wend. (N. Y.) 90; *Weaver v. Devendorf*, 3 Denio (N. Y.) 117; *Vall v. Owen*, 19 Barb. (N. Y.) 23; *Brown v. Smith*, 24 Barb. 419; *People v. Reddy*, 48 Barb. 539; *Vose v. Willard*, 47 Barb. 320; *Bell v. Pierce*, 48 Barb. 51; *Barhyte v. Shepherd*, 35 N. Y. 238; *Western R. R. Co. v. Nolan*, 48 N. Y. 513; *Steam Navigation Co. v. Wasco County*, 2 Ore. 209; *Macklot v. Davenport*, 17 Iowa 379; *Muscatine, &c., R. R. Co. v. Horton*, 38 Iowa 33; *Walker v. Hallock*, 33 Ind. 239; *Wall v. Trumbull*, 16 Mich. 228; *Lillenthal v. Campbell*, 23 La. Ann. 600; *Williams v. Weaver*, 75 N. Y. 30; *Bufalo, &c., R. R. Co. v. Supervisors*, 48 N. Y. 93; *McDaniel v. Tebbetts*, 60 N. H. 497; *Wilson v. Marsh*, 34 Vt. 352; *San Jose Gas Co. v. January*, 57 Cal. 614.

<sup>3</sup> *Steele v. Dunham*, 26 Wis. 393.

<sup>4</sup> *Van Steenberg v. Bigelow*, 3 Wend. (N. Y.) 42.

<sup>5</sup> *Sage v. Laurain*, 19 Mich. 187.

*Contra*, where highway was laid out for express purpose of avoiding a toll-gate. *Turnpike Road v. Ohampney*, 2 N. H. 199.

<sup>6</sup> *Harrington v. Commissioners*, 2 McCord, (S. C.) 400; *Freeman v. Cornwall*, 10 Johns. (N. Y.) 470.

<sup>7</sup> *Rowe v. Addison*, 34 N. H. 306.

<sup>8</sup> *Waldron v. Berry*, 51 N. H. 136; *Adams v. Richardson*, 43 N. H. 212.

<sup>9</sup> *McOsker v. Burrell*, 55 Ind. 435; *Spitznogle v. Ward*, 64 Ind. 30.

<sup>10</sup> *Wall v. Trumbull*, 16 Mich. 228.

<sup>11</sup> *Gould v. Hammond*, 1 McAllister, (U. S. C. C.) 285.

<sup>12</sup> *Burton v. Fulton*, 49 Penn. St. 151; see also *Chamberlain v. Clayton*, 56 Iowa 331, 41 Am. Rep. 101; *Gregory v. Small*, 39 Ohio St. 346; *Morrison v. McFarland*, 51 Ind. 306. Is liable where he acts maliciously. *Elmore v. Overton*, 104 Ind. 343, 54 Am. Rep. 343.

<sup>13</sup> *Stewart v. Southard*, 17 Ohio 402, 49 Am. Dec. 463; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256; *Stephenson v. Hall*, 14 Barb. (N. Y.) 232; *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343; *Spear v. Cummings*, 23 Pick. (Mass.) 224, 34 Am. Dec. 53; *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163.

in deciding upon the letting of contracts,<sup>1</sup> or the approval of liquor bonds,<sup>2</sup> or in deciding a building to be a nuisance and ordering its destruction;<sup>3</sup> *county commissioners* in deciding upon an application for a permit to sell intoxicating liquors;<sup>4</sup> *super-visors* in determining upon the sufficiency of an officer's bond and whether, by failing to file a new bond required by them, he has forfeited his office;<sup>5</sup> *pilot officers* in deciding that a pilot was no longer authorized to act as such and therefore revoking his license;<sup>6</sup> *commissioners* authorized to straighten a river to prevent inundations;<sup>7</sup> *inspectors of election*<sup>8</sup> and *boards of registration*<sup>9</sup> in deciding upon the existence of the necessary qualifications of a voter; *notaries* in taking and certifying acknowledgments;<sup>10</sup> *inspectors of provisions* in deciding upon

<sup>1</sup>East River Gas L. Co. v. Donnelly, 25 Hun (N. Y.) 614 s. c. 93 N. Y. 557.

<sup>2</sup>Amperse v. Winslow, 75 Mich. 284, 42 N. W. Rep. 823.

<sup>3</sup>Pruden v. Love, 67 Ga. 190.

<sup>4</sup>State v. Commissioners, 45 Ind. 501.

<sup>5</sup>People v. Supervisors, 10 Cal. 844, 846.

<sup>6</sup>Downer v. Lent, 6 Cal. 94, 65 Am. Dec. 469.

<sup>7</sup>Green v. Swift, 47 Cal. 596.

<sup>8</sup>Bevard v. Hoffman, 18 Md. 479, 81 Am. Dec. 618; Friend v. Hamill, 34 Md. 298; Elbin v. Wilson, 33 Md. 135; Anderson v. Baker, 23 Md. 531; Gordon v. Farrar, 2 Doug. (Mich.) 411; Jenkins v. Waldron, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; Goetchius v. Matthewson, 61 N. Y. 420; Weckerley v. Geyer, 11 S. & R. (Penn.) 35; Morgan v. Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Caulfield v. Bullock, 18 B. Mon. 495; Chrisman v. Bruce, 1 Duval (Ky.) 63, 85 Am. Dec. 606; Miller v. Rucker, 1 Bush (Ky.) 135; Carter v. Harrison, 5 Blackf. (Ind.) 188; Rail v. Potts, 8 Humph. (Tenn.) 225; Wheeler v. Patterson, 1 N. H. 88, 8

Am. Dec. 41; Peavey v. Robbins, 3 Jones (N. C.) L. 389; Fausler v. Parsons, 6 W. Va. 486, 20 Am. Rep. 431; State v. McDonald, 4 Harr. (Del.) 555; State v. Porter, 4 Harr. 556; Patterson v. D'Auterive, 6 La. Ann. 467, 54 Am. Dec. 564; Dwight v. Rice, 5 La. Ann. 580; Bridge v. Oak-ey, 2 La. Ann. 968; Keenan v. Cook, 12 R. I. 52; Ashby v. White, 2 Ld. Raym. 938.

A different rule prevails in Massachusetts and Ohio, although the officers have acted in good faith; Lincoln v. Hapgood, 11 Mass. 350, 355; Kilham v. Ward, 2 Mass. 236; Capen v. Foster, 12 Pick. 485, 23 Am. Dec. 633; Henshaw v. Foster, 9 Pick. 312; Keith v. Howard, 24 Pick. 229; Blanchard v. Stearns, 5 Metc. 299; Larned v. Wheeler, 140 Mass. 390, 54 Am. Rep. 438; Jeffries v. Ankeny, 11 Ohio 372; Anderson v. Millikin, 9 Ohio St. 568; Monroe v. Collins, 17 Ohio St. 665.

See also Murphy v. Ramsey, 114 U. S. 15.

<sup>9</sup>Fausler v. Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

<sup>10</sup>Henderson v. Smith, 26 W. Va. 330, 53 Am. Rep. 139; Commonwealth

in a civil action for damages for an award alleged to have been made by him fraudulently and corruptly;<sup>1</sup> nor a grand juror for conduct as such alleged to have been wilful and malicious;<sup>2</sup> nor a pilot commissioner for wrongfully and maliciously revoking a pilot's license;<sup>3</sup> nor members of a common council for wilfully and corruptly refusing to accept the plaintiff's bid for doing public work;<sup>4</sup> nor members of a board of registration for erasing the plaintiff's name from the list of registered voters, though it was alleged to have been done "wilfully, unlawfully, knowingly, maliciously and corruptly," the board having complied with all the requirements of the statute necessary to give them jurisdiction;<sup>5</sup> nor assessors who are alleged to have wilfully and corruptly refused to allow the plaintiff an exemption from taxation to which he was entitled;<sup>6</sup> nor a member of a common council

<sup>1</sup> *Jones v. Brown*, 54 Iowa 74, 87 Am. Rep. 185.

<sup>2</sup> *Turpen v. Booth*, 56 Cal. 65, 88 Am. Rep. 48. The court cite and rely upon *Weaver v. Devendorf*, 3 Denio (N. Y.) 120, 121; *Bradley v. Fisher*, 18 Wall. (U. S.) 335, and *Downer v. Lent*, *post*.

<sup>3</sup> *Downer v. Lent*, 6 Cal. 94, 65 Am. Dec. 489.

<sup>4</sup> *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557, affirming 25 Hun 914. In this case, DANFORTH, J., said that it is "the well-settled rule of law that no public officer is responsible in a civil suit for a judicial determination, however erroneous or wrong it may be, or however malicious even the motive which produced it."

<sup>5</sup> *Fausler v. Parsons*, 6 W. Va. 486, 20 Am. Rep. 431.

<sup>6</sup> *Weaver v. Devendorf*, 3 Denio (N. Y.) 117. In this case the court per BEARDSLEY, J., said: "The act complained of in this case was a judicial determination. The assessors were judges acting clearly within the scope and limit of their authority. They were not volunteers, but the duty was

imperative and compulsory; and, acting as they did, in the performance of a public duty, in its nature judicial, they were not liable to an action, however erroneous or wrongful their determination may have been. This case might be disposed of on narrow ground, for there was no evidence to justify the conclusion that the defendants acted maliciously in fixing the value of the property of the plaintiff or of any one else; and surely it will not be pretended they were liable for a mere error of judgment. But I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors and to all public officers, whatever name they may bear, in the exercise of judicial pow-

for "wilfully, wrongfully and maliciously and well knowing his duty" refusing to vote for the approval of a liquor bond.<sup>1</sup>

These cases are believed to follow the better and the safer rule. If the action is really judicial, the immunity which adheres to judicial action should be applied whether the officer sits upon the bench of a regularly established court or not. As has been said,<sup>2</sup> if the action can be maintained by the allegation of improper motives, no litigant will fail to allege that they existed, and the public officer may constantly be called upon to defend himself from actions at law brought with motives fully as malicious as those which are asserted to have inspired him. Public policy, it is believed, requires that *all* judicial action shall be exempt from question in private suits.

§ 641. Same Subject—Officer must keep within his Jurisdiction.—But in order to render the *quasi*-judicial officer exempt, he must, like the judicial,<sup>3</sup> keep within the limit, fixed by law, of his jurisdiction; for if he exceeds it, except as the result of a mistake of fact,<sup>4</sup> he will be liable to the party injured.<sup>5</sup>

Illustrations of this liability may be found in the cases in which an assessor has undertaken to tax persons or property not within his jurisdiction,<sup>6</sup> or election officers have insisted upon other proof of qualification than that which the law declared sufficient,<sup>7</sup> or highway officers have undertaken to do a thing prohibited by law.<sup>8</sup>

As to the rule which should apply in the case of a *quasi*-judicial officer who is called upon to decide from the facts presented

er." Followed in *Brown v. Smith*, 24 Barb. (N. Y.) 419.

The rule here laid down was also approved in Wisconsin: *Steele v. Dunham*, 26 Wis. 398.

<sup>1</sup> *Amperse v. Winslow*, 75 Mich. 234, 42 N. W. Rep. 823.

<sup>2</sup> *Bradley v. Fisher*, 13 Wall. (U. S.) 335.

<sup>3</sup> See *ante*, § 624.

<sup>4</sup> As to which, see *ante*, § 634.

<sup>5</sup> *Freeman v. Kenney*, 15 Pick. (Mass.) 44; *Gage v. Currier*, 4 Pick. 399; *Suydam v. Keys*, 18 Johns. (N. Y.) 444; *Mygatt v. Washburn*, 15 N.

Y. 316; *Hays v. Steamship Co.* 17 How. (U. S.) 596; *Williams v. Weaver*, 75 N. Y. 80; *Goetcheus v. Matthewson*, 61 N. Y. 420.

<sup>6</sup> *Freeman v. Kenney*, 15 Pick. (Mass.) 44; *Gage v. Currier*, 4 Pick. (Mass.) 399; *Suydam v. Keys*, 18 Johns. (N. Y.) 444; *Mygatt v. Washburn*, 15 N. Y. 316.

<sup>7</sup> See *post*, § 695.

<sup>8</sup> *Adams v. Richardson*, 43 N. H. 212, as explained in *Waldron v. Berry*, 51 N. H. 186. See also *Rowe v. Addison*, 84 N. H. 306; *Sawyer v. Keene*, 47 N. H. 173.

to him whether he has jurisdiction or not, and who thereupon erroneously decides in the affirmative, the authorities directly in point are not clear, but upon principle it would seem that the same rule should apply which has been noticed in respect of inferior courts and magistrates,—that he is not liable where a case, belonging to a class of which he has jurisdiction, is by complaint, affidavit, petition or other prescribed kind of proceeding, put at last colorably under his jurisdiction.<sup>1</sup>

§ 642. Same Subject—Quasi-judicial Officer liable who invades Rights of Property.—But inasmuch as the law quite universally protects private property from appropriation to the public use without compensation, the judgment or discretion of the *quasi*-judicial officer, though exercised honestly and in good faith, will not protect him where by virtue of it he undertakes to invade the private property rights of others, to whom no other redress is given than an action against the officer.\*

"The principle involved in this holding, and which, upon the whole, I believe to be sound," said Judge DILLON in an Iowa case,<sup>2</sup> "is this: That where a public officer other than a judicial

<sup>1</sup> See *ante*, § 632.

<sup>2</sup> *McCord v. High*, 24 Iowa 336; *Cubit v. O'Dett*, 51 Mich. 347. In both of these cases, highway officers had injured private property by cutting drains. In the latter case COOLLEY, J., said: "Highway authorities have no more right than private persons to cut drains, the necessary result of which will be to flood the lands of individuals. This was shown in *Ashley v. Port Huron*, 85 Mich. 296, a. c. 24 Am. Rep. 552, where many authorities are referred to. The highway officer no doubt has a discretion in deciding how and where he will expend highway labor; but it is a discretion limited by the rights of individuals, and when he invades those rights he becomes liable. *Tearney v. Smith*, 86 Ill. 391. And when he is liable for a lawless act, all his assistants are liable with him for the consequent in-

jury. *Story on Agency*, §§ 311, 312; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Coventry v. Barton*, 17 Johns. 142, a. c. 8 Am. Dec. 376; *Fielder v. Maxwell*, 2 Blatch. (U. S. O. C.) 552; *Tracy v. Swartwout*, 10 Pet. (U. S.) 80; *Smith v. Colby*, 67 Me. 169. This rule sometimes, when the agent has acted in good faith and without knowledge of the want of legal authority, may seem to operate oppressively, but it is a necessary and very just rule notwithstanding, and full protection of the citizen in his legal rights would be impossible without it. Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another."

See also *Stone v. Augusta*, 46 Me. 137.

<sup>3</sup> DILLON, Ch. J., in *McCord v.*

one, does an act directly invasive of the private rights of others, and there is otherwise no remedy for the injury, such officer is personally liable without proof of malice and an intent to injure."

This question most frequently arises in actions against officers charged with the duty of laying out, constructing and keeping in repair public roads, bridges and water ways. As to whom, the same judge continues, "The discretion which protects such an officer as the road supervisor stops at the boundary where the absolute rights of property begin."

But in most of the States provision is made by statute for the acquisition of the rights required under the power of eminent domain, or the township, county or other municipality is made liable for the acts of the officer. In such States the officer who keeps within his jurisdiction, is not personally liable.<sup>1</sup>

§ 643. Same Subject—Liable where he acts ministerially.—But the *quasi*-judicial officer, like the judicial, may and often does act ministerially, and, when so acting, he is liable for carelessness or negligence like any other ministerial officer.<sup>2</sup>

What acts are ministerial, and what the liability is which attends upon such acts, will be considered in a following chapter.<sup>3</sup> But, in general, it is said<sup>4</sup> "There can be no great difficulty in determining, when an officer is charged with both judicial and ministerial duties, to which class of duties a particular act belongs.

The character of the act itself will usually determine whether it be judicial or ministerial. If it be the execution of a deter-

High, 24 Iowa 886, 850. In this case, the learned judge held that the action could neither be brought against the road district, the township nor the county.

<sup>1</sup> *McOsaker v. Burrell*, 55 Ind. 425; *Spitznogle v. Ward*, 64 Ind. 80; *Waldron v. Berry*, 51 N. H. 186, 144.

But see *Callender v. Marsh*, 1 Pick. (Mass.) 418, 432; *Benden v. Nashua*, 17 N. H. 477.

"There is no liability," says CHAMPLIN, J., "for doing an act which is

either directed or authorized by a valid statute, if performed with reasonable care and skill." *Highway Commissioners v. Ely*, 54 Mich. 173. See also *Sage v. Laurain*, 19 Mich. 187.

<sup>2</sup> *McCord v. High*, 24 Iowa 886, 845; *Wilson v. Marsh*, 84 Vt. 852; *Rowe v. Addison*, 84 N. H. 806.

<sup>3</sup> See *post*, §§ 699-701.

<sup>4</sup> In *McCord v. High*, 24 Iowa 886, 845.



mination, committed by the law to the judgment and discretion of the officer, which could be as well done by another as by the one thus clothed with the power of determination, it is a ministerial act. The fact that it requires skill and involves judgment and discretion will not give it a judicial character."

Continuing, the same judge illustrated the distinction in the case at bar, as follows: "The proper performance of grading, ditching and the construction of masonry, though they may require the highest order of engineering and mechanical skill, and demand the exercise of a high order of judgment in the selection of materials, and of discretion in the choice of means, cannot be regarded as the discharge of judicial functions. But the determination that such work is necessary and must be accomplished, may properly be said to partake of a judicial character.

This brings me to the application of these principles to the case at bar. The defendant, as supervisor of roads, is required by law to keep the highways in repair; he determines when and where repairs are necessary, and what work shall be done in order to effect the repairs. The determination may be regarded as of a judicial nature.

He also is required to direct the work, to make the repairs he has determined upon; this is simply a ministerial duty."<sup>1</sup>

<sup>1</sup> Citing *Lacour v. Mayor of New Dutch*, (N. J.) 56; *Rochester White York*, 8 Duer. 406; *Lloyd v. Mayor of Lead Co. v. City of Rochester*, 3 N. New York, 5 N. Y. 869, 55 Am. Dec. Y. 463, 58 Am. Dec. 816.  
347; *City of Camden v. Mulford*, 2

## CHAPTER V.

## OF THE LIABILITY OF LEGISLATIVE OFFICERS TO PRIVATE ACTION.

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| <p>§ 644. Legislative Officers not liable to civil Action for legislative acts.</p> <p>645. Same Subject—Motive alleged is immaterial.</p> <p>646. Same Subject—Immunity extends to all Grades of legislative Action.</p> <p>647. Same Subject—Officer liable when he acts ministerially.</p> <p>648. Constitutional Privileges—Freedom from Arrest or Suit while on Duty.</p> | <p>§ 649. Same Subject—Freedom of Speech and Action while on Duty.</p> <p>650. Same Subject—Scope of the Privilege.</p> <p>651. Same Subject—House must be in Session—Acts in Committee or joint Convention.</p> <p>652. Same Subject—Illustrations—Slander and Libel—Imprisonment for Contempt.</p> <p>653. Same Subject—Privilege confined to Member.</p> |
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§ 644. **Legislative Officers not liable to civil Action for legislative Acts.**—Members of public legislative bodies are chosen by their constituents to enact such laws, regulations and rules of conduct as in their judgment are best suited to the welfare and prosperity of the people within their jurisdiction. They are called upon to exercise their judgment and discretion as to what the people need and what will best supply the requirements. The performance of their duties is owing to the public,—to the community at large, and not to individuals; and they would certainly perform their duties in a timid and time-serving manner,—if, indeed, they would undertake their performance at all,—if every dissatisfied person could compel them to vindicate the wisdom of their enactments in an action for damages.

For these and other reasons, similar to those which operate the immunity of judicial officers, the rule is well settled that a public legislative officer is not liable to individuals for his legislative action.<sup>1</sup>

<sup>1</sup> Cooley on Torts (1st ed.) 276; Rep. 506; Baker v. State, 27 Ind. Jones v. Loving, 55 Miss. 109, 80 Am. 485; County Commissioners v.

§ 645. **Same Subject—Motive alleged is immaterial.**—"It certainly can not be argued," says CHALMERS, J., "that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable upon an allegation that they acted maliciously toward the person aggrieved by the passage of the law." This is but the same rule which, as has been seen, applies to the judicial officer, and it rests upon the same considerations.\*

§ 646. **Same Subject—This Immunity extends to all Grades of legislative Action.**—This immunity is not confined to members of national and state legislatures, but extends to the protection of the members of the inferior legislative bodies such as boards of supervisors, county commissioners, city councils,<sup>3</sup> and the like.<sup>4</sup> Here, as the case of the judicial officer, it is the character of the duty and not the name of the office which controls. Thus continues CHALMERS, J., "Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government and are exempt from all liability for their mistaken use."<sup>5</sup>

§ 647. **Same Subject—Officer liable where he acts ministerially.**—But the legislative officer, like the judicial, may be called upon to act ministerially, as when he is required to do some act in a prescribed manner irrespective of his own judgment as to the propriety or desirability of its being done, and in such a case he will be liable to the individual injured by his failure or neglect, as in other cases of ministerial action.<sup>6</sup> But the party complaining must, in this as in other cases,<sup>7</sup> show a special injury to himself.<sup>8</sup>

Duckett, 20 Md. 469, 83 Am. Dec. 557; Borough of Freeport v. Marks, 59 Penn. St. 253; Wilson v. Mayor of New York, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; Ferguson v. Kinnoull, 9 Cl. & Fin. 251.

<sup>3</sup> Jones v. Loving, 55 Miss. 109, 30 Am. Rep. 508; Amperse v. Winslow, 75 Mich. 284.

<sup>4</sup> See *ante*, § 621.

<sup>5</sup> Amperse v. Winslow, 75 Mich. 284.

<sup>6</sup> Cooley on Torts, 376; Jones v. Loving, 55 Miss. 109, 30 Am. Rep. 508; County Commissioners v. Duckett, 20 Md. 468, 83 Am. Dec. 557; Borough of Freeport v. Marks, 59 Penn. St. 253.

<sup>7</sup> In Jones v. Loving, *supra*.

<sup>8</sup> Cooley on Torts, 377.

<sup>9</sup> See *ante*, § 600.

<sup>10</sup> Amperse v. Winslow, 75 Mich. 284.

So the performance of their duty by such officers either individually or collectively may, as will be seen, be enforced in proper cases by mandamus.<sup>1</sup>

§ 648. **Constitutional Privileges—Freedom from Arrest or Suit while on Duty.**—But not only are legislative officers thus exempt from general liability, but certain special privileges are accorded them by the respective constitutions under which they act.

Thus the constitution of the United States declares that senators and representatives shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same.

The constitutions of most of the States, however, extend this privilege still further, and the members are not only privileged from arrest either in criminal or civil cases but from the service of all civil process during the session of the legislature and while coming from and returning to their homes.

Courts do not take judicial notice of this privilege, but the party entitled to it must claim its benefit by proper plea or motion, or it will be deemed to have been waived.<sup>2</sup>

Officers having writs to serve against the person of a legislator are not bound to notice his privilege from arrest, but may execute their process without liability, leaving the party to insist upon his privilege in the proper manner.<sup>3</sup>

§ 649. **Same Subject—Freedom of Speech and Action while on Duty.**—So the constitution of the United States provides that members of the national legislature, for any speech or debate in either house, shall not be questioned in any other place; and a similar provision is found in the constitutions of most if not all of the States.

These provisions, it has been held, should be liberally rather than strictly construed. Thus in a leading case in Massachusetts,<sup>4</sup>

<sup>1</sup> *Ex parte Pickett*, 24 Ala. 91.

<sup>2</sup> *Prentiss v. Commonwealth*, 5 Rand. (Va.) 697, 16 Am. Dec. 783; *Holiday v. Pitt*, 2 Strange 985; *McPherson v. Nesmith*, 3 Gratt. (Va.) 241; *Lyell v. Goodwin*, 4 McLean (U. S. C. C.) 29; *Gyer v. Irwin*, 4 Dall. 107; *Chase v. Fish*, 16 Me. 136.

<sup>3</sup> *Carle v. Delesdernier*, 18 Me. 363, 29 Am. Dec. 508; *Tarleton v. Fisher*, 2 Doug. 671; *Sperry v. Willard*, 1 Wend. (N. Y.) 82; *Secor v. Bell*, 18 Johns. (N. Y.) 52; *Chase v. Fish*, 16 Me. 132.

<sup>4</sup> *Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189.

whose constitution secured "freedom of deliberation, speech and debate," Chief Justice PARSONS said: "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered."

§ 650. **Same Subject—Scope of the Privilege.**—"I will not confine it," continues the learned judge,<sup>1</sup> "to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber."

§ 651. **Same Subject—House must be in Session—Acts in Committee or joint Convention.**—"He cannot be exercising the functions of his office as a member of a body," continues the learned judge,<sup>1</sup> "unless the body be in existence. The house must be in session to enable him to claim that privilege; and it is in session notwithstanding occasional adjournments for short intervals, for the convenience of its members. If a member, therefore, be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body of which he is a member is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for everything said or done by him in the exercise of his functions as a representative, in

<sup>1</sup> In *Coffin v. Coffin*, *supra*.

committee, either in debating, in assenting to, or in draughting a report. Neither can I deny the member his privilege when executing the duties of his office in a convention of both houses, although the convention should be held in the senate chamber."

This construction of the privilege is approved by the Supreme Court of the United States.<sup>1</sup>

§ 652. **Same Subject—Illustrations—Slander and Libel—Imprisonment for Contempt.**—The privilege has been most frequently invoked in actions of slander and libel—to which, within the limits fixed, it furnishes a complete defense—for words spoken or written by the member in speeches upon the floor of the house or in reports made by him as a member of committees,<sup>2</sup> but it has also been frequently appealed to in actions for false imprisonment where the legislature has acted under its power to punish for contempt.

The power of either house to imprison for an alleged contempt of its rules or orders has been thoroughly considered in several important cases, and its extent has been defined with clearness.<sup>3</sup>

A legislative body, like the United States House of Representatives possesses the power to punish its own members for disorderly behavior and this punishment may be by imprisonment;<sup>4</sup> it may also punish in the same way its members for their absence;<sup>5</sup> as incidental to its power to decide upon the qualification and election of its members it has an undoubted right to examine witnesses and inspect papers, and to punish for contempt witnesses who refuse to testify;<sup>6</sup> as incidental to its power to impeach officers of government, it may compel witnesses to attend and

<sup>1</sup> Kilbourn v. Thompson, 108 U. S. 168, 203.

<sup>2</sup> Stockdale v. Hansard, 9 Ad. & El. 1; Coffin v. Coffin, 4 Mass. 1, 8 Am. Dec. 189.

<sup>3</sup> Among the leading English cases are: Crosby's Case, 8 Wils. 188; Burdett v. Abbott, 14 East 1; Case of the Sheriff of Middlesex, 11 Ad. & El. 278; Keilley v. Carson, 4 Moo. P. C. 63; Beaumont v. Barrett, 1 Moo.

P. C. 59; Fenton v. Hampton, 11 Moo. P. C. 347; Doyle v. Falconer, L. R. 1 P. C. 328.

<sup>4</sup> Kilbourn v. Thompson, 108 U. S. 168; Hiss v. Bartlett, 8 Gray (Mass.) 468, 63 Am. Dec. 768.

<sup>5</sup> Kilbourn v. Thompson, 108 U. S. 168.

<sup>6</sup> Kilbourn v. Thompson, 108 U. S. 168, Burnham v. Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

answer;<sup>1</sup> but it possesses no general power to punish for contempt, and can only punish a witness for contumacy where his testimony is required in a matter into which it has jurisdiction to inquire.<sup>2</sup>

Its power, in any case, is not a question for its determination alone, but wherever it attempts to affect individual rights or liberty, its jurisdiction is always open to judicial inquiry in the proper court.<sup>3</sup>

§ 653. **Same Subject—Privilege confined to Member.**—But the privilege is confined to the member alone and, though it may afford him protection against an action for slander or libel for language used by him, it will not protect the outsider who publishes it;<sup>4</sup> and though the member who has concurred in directing an arrest in a case beyond the jurisdiction of the house will not be liable, the officer who makes the arrest will not be privileged.<sup>5</sup>

<sup>1</sup> *Kilbourn v. Thompson*, 103 U. S. 168.

<sup>2</sup> *Kilbourn v. Thompson*, 103 U. S. 108.

<sup>3</sup> *Kilbourn v. Thompson*, 103 U. S. 168, overruling to this extent *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, *Williamson v. Berry*, 8 How. (U. S.) 495; *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *Knowles v. Gas L.*

*Co.* 19 Wall. 58; *Pennoyer v. Neff*, 95 U. S. 714. See also to like effect, *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

<sup>4</sup> *Stockdale v. Hansard*, 9 Ad. & El. 1.

<sup>5</sup> *Kilbourn v. Thompson*, 103 U. S. 168, overruling *Anderson v. Dunn*, 6 Wheat. (U. S.) 204.

## CHAPTER VI.

### OF THE LIABILITY OF MINISTERIAL OFFICERS TO PRIVATE ACTION.

§ 654. In general.

655. How here designated—Ministerial Officers.

656. How Subject divided.

#### A. LIABILITY FOR HIS OWN DEFAULTS.

##### I. IN GENERAL OF THE DUTY AND THE LIABILITY.

657. Ministerial Functions and Officers defined.

658. Same Subject—Determination of Occasion or Conditions not excluded.

659. Same Subject—Tested by Mandamus.

660. Same Subject—Judicial Officer may act ministerially.

661. Ministerial Officer acting with due Care according to law incurs no Liability.

662. Unconstitutional Law affords no Protection.

663. Officer must keep within Authority conferred by Law.

664. Ministerial Officer who fails to act or who acts improperly liable to Party specially injured.

665. Same Subject—What this Rule includes.

666. Duty must be one which Officer may lawfully perform.

667. Duty of Officer must be absolute.

668. Duty of Officer must be personal.

§ 669. Officer must have legal Authority and Ability to perform.

670. Mistake or good Faith no Excuse.

671. That Violation is punishable no Defence.

672. No Excuse that Duty was owing primarily to Public if Individual has special Interest.

673. But no Liability where Duty owing solely to the Public.

674. Party suing must show Injury from Breach of Duty owing to himself.

675. Only proximate Damages can be recovered.

676. *De Facto* Officer liable for Negligence.

677. Presumption of due Performance.

678. Subordinate Officers are liable for their own Defaults.

679. Liability of Deputies.

680. Effect of contributory Negligence.

681. Liability when Services are gratuitous.

682. Liability of Officer upon his Bond.

##### II. LIABILITY OF PARTICULAR OFFICERS.

683. In general.

1. *Assignee in Bankruptcy.*

684. Liable for Neglect of prescribed Duties.



2. *Canal Contractors.*

- § 685. Are liable for Injuries from Defaults.

3. *Clerks of Courts.*

686. Are liable for ministerial Defaults.  
687. Duty to allow Inspection of Records.  
688. Duty to furnish Copies of Records.

4. *Collector of Taxes.*

689. Must act by Warrant.  
690. Protected by Process fair on its Face.  
691. Effect of extrinsic Knowledge of Defects.  
692. Collector not protected if Warrant not fair on its Face.  
693. Collector liable if he exceeds or abuses his Authority.  
694. Liability for Money received on void Process.

5. *Election Officers.*

695. Inspectors.  
696. Registration Officers.  
697. Canvassers.  
698. Inducting Officers.

6. *Highway Officers.*

699. Not liable for lawful Acts within their Jurisdiction.  
700. Distinction between judicial and ministerial Acts by such Officers.  
701. Liable for Neglect to repair where charged with Duty and provided with Funds.

7. *Inspectors of Provisions.*

702. Liable for Negligence.

8. *Notaries Public.*

703. In general.  
704. Liable for Negligence in presenting or protesting negotiable Paper.  
705. Same Subject—What will excuse Notary.

- § 706. Liability for Defaults in taking Acknowledgments.

707. Same Subject—1. For knowingly making a false Certificate.

708. Same Subject—2. For Mistakes in Identity of Parties.

709. Same Subject—3. For defective Certificate.

710. Same Subject—Default of Notary must be proximate Cause of Injury.

711. Same Subject—The Measure of Damages.

712. Same Subject—Mitigation of Damages.

9. *Post-officers.*

713. Each liable for his own Defaults only.

10. *Public School and College Officers and Teachers.*

714. Distinction to be made between public and private Schools.

a. *Officers.*

715. Have Power to enact reasonable Rules and Regulations.

716. What this Rule includes.

717. Rules need not be formal or of Record.

718. School Officers not liable for Errors in Judgment.

719. Are liable only when actuated by Malice.

720. Question of Reasonableness of Regulations is for the Court.

721. What Rules and Regulations are valid—Instances.

722. What Rules and Regulations are not reasonable—Instances.

723. Regulations must be enforced in reasonable Manner;

724. Liability for not repairing.

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§ 725. Liability for not performing ministerial Duty — Requiring Bond from Contractors.

b. Teachers.

- 726. Are to some extent public Officers.
- 727. Are subject to Rules prescribed by Board.
- 728. Where Board has prescribed no Rules Teacher may do so.
- 729. Rules prescribed by Teacher must be reasonable.
- 730. Authority of Teacher not confined to School-room.
- 731. Right to inflict corporal Punishment.
- 732. Teacher not liable to Parent for refusing to receive Child as Pupil.

11. *Recorders of Deeds.*

- 733. Duties are chiefly owing to Individuals.
- 734. Duty to record proper Instruments.
- 735. Must not deliver Deed before recording it.
- 736. Liable for making an imperfect Record.
- 737. Liable for not making Index as required.
- 738. Duty to allow Inspection of Records.
- 739. Duty of permitting Strangers to make Abstracts of Title.
- 740. Duty in furnishing Copies of Records.
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12. *Sheriffs, Marshals, Coroners and Constables.*

- 742. Duties and Liabilities are similar.
- 743. What Parties are interested.
- a. To the Plaintiff in the Process.
- 744. Duty to execute lawful Process.

§ 745. Must serve irregular or voidable Process.

- 746. Need not serve void Process.
- 747. Right to demand Prepayment of his Fees.
- 748. Right to demand Indemnity.
- 749. If no Indemnity demanded, Officer is bound to serve.
- 750. When promise of Indemnity will be implied.
- 751. Officer liable for Loss resulting from neglecting Instructions.
- 752. Officer bound for reasonable Skill and Diligence.
- 753. Liable for Negligence in serving Process for Appearance.
- 754. Liable for Negligence in searching for Property.
- 755. Liable for Negligence in making an insufficient Levy.
- 756. Liable for surrendering Property without Cause.
- 757. Liable for negligent Delay in making Levy.
- 758. Liable for Neglect to levy at all.
- 759. Liability for Escapes.
- 760. Liability for Neglect in keeping Property seized.
- 761. Same Subject—Delivery Bonds — Receptors.
- 762. Liability for accepting insufficient Bonds.
- 763. Liability in making Sales.
- 764. Liability for not making Return and for a false Return.
- 765. Liability for Money received.
- 766. The Measure of Damages.
- b. To the Defendant in the Writ.
- 767. In general.
- 768. No Liability arises from proper Service of valid Process.
- 769. Same Subject—What is meant by Process.
- 770. Liability for illegal Arrest.
- 771. Liability for refusing Bail or other Abuses.

- § 772. Liability for Levy under void, paid, expired or superseded Process.
773. Liability for excessive Levy,
774. Liability for disregarding Exemptions.
775. Liability for Neglect in caring for Property.
776. Liability for taking insufficient Security.
777. Liability for Misconduct in making Sale.
778. Liability for other Abuse of Process.
779. Liability for unlawfully Breaking into the Dwelling-house.
- a. To Strangers to the Writ.
780. In general.
781. Liability for Arrest upon Warrant against another.
782. Liability for taking Goods of one Person on Writ against another.
783. Liability for Levy on mortgaged Property.
18. *Tax Officers.*
784. Liability for not levying Tax.
785. Same Subject—The Measure of Damages.
786. Same Subject—Action may be brought in foreign State.
787. Liability for false Return.

**B. FOR DEFAULTS OF HIS OFFICIAL SUBORDINATES.**

§ 788. In general.

**I. PUBLIC OFFICERS OF GOVERNMENT.**

789. Public Officer of Government not liable for Acts of his official Subordinates.
790. Same Subject—Exceptions to this Rule.
791. This Rule applies—1. To Post-officers.
792. 2. To Mail Contractors.
793. 3. To Collectors of Customs.
794. 4. To Captain of Ship of War.
795. 5. To Confederate District Commissary.

**II. PUBLIC TRUSTEES AND COMMISSIONERS.**

796. Not liable for Negligence of Subordinates.

**III. MINISTERIAL OFFICERS.**

797. Liable for Defaults of their Deputies.
798. This Rule applies—1. To Sheriffs.
799. 2. To Recordors of Deeds.
800. 3. To Clerks of Courts.
801. 4. To other Officers.

**C. FOR DEFAULTS OF HIS PRIVATE SERVANT OR AGENT.**

802. Liable for Torts of Private Servant or Agent.

§ 654. In general.—Having now considered the question of the liability to private action of three of the great classes of public officers,—the governing or executive class; the weighing, deliberating, deciding or judicial class, and the law making or legislative class, it now remains to deal with the fourth great class of public officers,—those who execute and enforce the judgments, decrees and orders of superior courts and officers and who perform all those various duties for individuals which the law has, for their security and protection, clearly and absolutely imposed.

§ 655. **How here designated—Ministerial Officer.**—This class of officers is known by different names. They are sometimes called executive officers, sometimes administrative, sometimes ministerial, and with slight shades of distinction. But for convenience sake, and as may properly be done, they will all be treated here under the general head of ministerial officers, and there will be included all officers whose duties are wholly or chiefly ministerial.

§ 656. **How Subject divided.**—In doing this, the general questions of the nature of the duty and the liabilities it imposes will first be considered, after which several of the more important classes of ministerial officers will be separately dealt with.

Regard must also be had to the distinctions between the liability of the officer for his own defaults, for those of his official subordinates and for those of his own private servants and agents. Hence—

#### A.

##### LIABILITY FOR HIS OWN DEFAULTS.

#### I.

##### IN GENERAL OF THE DUTY AND THE LIABILITY.

§ 657. **Ministerial Functions and Officers defined.**—The difficulty of dealing with questions of liability for judicial or ministerial action does not lie so much in the determination of the proper principle of law to be applied when the nature of the action has been ascertained, as in determining whether the given act shall be considered as judicial or ministerial in its character.

The majority of cases, perhaps, are easily distinguished, but there are still many others which lie so near the line that courts have found it extremely difficult to decide upon the true nature of the duty.

No inflexible rule can be laid down by which this difficulty can be solved in every case. Each case must be determined upon an examination of all its facts. Here, too, as in other cases already considered, it is the nature of the duty and not the title of the officer which determines the liability.

The most important criterion, perhaps, is that the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.

Many definitions have been attempted by the courts. Thus it is said by a learned judge: "The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain specific duty arising from designated facts is a ministerial act."<sup>1</sup>

In the same line, a ministerial act has also been defined as "an act performed in a prescribed manner, in obedience to the law or the mandate of legal authority, without regard to, or the exercise of, the judgment of the individual upon the propriety of the acts being done."<sup>2</sup>

Other definitions appear in the note.<sup>3</sup>

§ 658. **Same Subject—Determination of Occasion or Conditions not excluded.**—That a necessity may exist for the ascertainment, from personal knowledge or by information derived from other sources, of those facts or conditions, upon the exist-

<sup>1</sup> *CLOPTON, J.*, in *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65.

<sup>2</sup> *Pennington v. Streight*, 54 Ind. 376; *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Ray v. Jeffersonville*, 90 Ind. 572.

<sup>3</sup> "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *State v. Johnson*, 4 Wall. (U. S.) 475, 498.

"A ministerial duty is one in respect to which nothing is left to dis-

cretion." *Sullivan v. Shanklin*, 68 Cal. 247, 251.

"A duty is ministerial when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to such individual." *Morton v. Comptroller-General*, 4 S. C. 430, 474.

"Where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment the act is ministerial." *Commissioner v. Smith*, 5 Tex. 471; *Arberry v. Beavers*, 6 Tex. 467; *Rains v. Simpson*, 50 Tex. 495, 32 Am. Rep. 609.

ence or fulfillment of which, the performance of the act becomes a clear and specific duty, does not operate to convert the act into one judicial in its nature.<sup>1</sup> Such, it is said, is not the judgment or discretion which is an essential element of judicial action.<sup>2</sup>

Thus a sheriff must determine whether process coming into his hands for service, is issued from a court of competent jurisdiction and is regular on its face, and a treasurer of public money must ascertain whether a warrant for its payment is drawn by such an officer and is in such a form that its payment becomes a duty; but the execution of the process and the payment of the warrant are ministerial acts. So a judge must determine whether a judgment is entered according to the verdict of the jury or the consideration of the court, and whether a bill of exceptions correctly recites the proceedings; but the act of signing the judgment or the bill of exceptions is a ministerial one.<sup>3</sup>

So, again, it is said that every selectman before the appointment of an overseer, and every sheriff previous to taking bail, makes inquiry to aid him in the legal performance of his duty, but the act in either case is ministerial.<sup>4</sup>

§ 659. **Same Subject—Tested by Mandamus.**—It has been said that, perhaps, as safe a criterion as any other to ascertain whether a private suit will or will not lie, is to adopt the rule which governs in determining whether mandamus would or would not be granted to compel the officer to perform the duty.<sup>5</sup>

This rule, which will be hereafter more fully considered,<sup>6</sup> is, briefly, that in matters which require judgment and consideration to be exercised by the officer, or which are dependent upon his discretion, mandamus will not be granted, but that for minis-

<sup>1</sup>Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Flournoy v. City of Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Ray v. City of Jeffersonville, 90 Ind. 573; Crane v. Camp, 12 Conn. 464; Betts v. Dimon, 3 Conn. 107.

<sup>2</sup>Grider v. Tally, 77 Ala. 422, 54

Am. Rep. 65; Crane v. Camp, 12 Conn. 464.

<sup>3</sup>Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65.

<sup>4</sup>Betts v. Dimon, 3 Conn. 107.

<sup>5</sup>Rains v. Simpson, 50 Tex. 495, 32 Am. Rep. 609; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65.

<sup>6</sup>See post, § 947.

terial acts in the performance of which no exercise of judgment or discretion is required, the writ will be granted.<sup>1</sup>

§ 660. **Same Subject—Judicial Officer may act ministerially.**—That the officer in question is one who usually acts judicially or *quasi*-judicially is not conclusive, for such officers may be and are frequently called upon to perform ministerial acts, and as to such acts they are governed by the same rules which control ministerial action in other cases.<sup>2</sup>

§ 661. **Ministerial Officer acting with due Care according to Law incurs no Liability.**—As has been seen, the judicial and the legislative officer acting in good faith within his jurisdiction incurs no liability to private individuals, notwithstanding that they may have erred in judgment or that individuals may have suffered injury. A somewhat similar but more absolute immunity attaches to the ministerial officer.

He is by law required to act; the manner, time and circumstances of his action are prescribed; he has no discretion whether to act or not; his action may be compelled by legal process; his duty is to do, not reason why. Such duties and responsibilities demand commensurate protection, and it is well settled that the ministerial officer who performs in the prescribed manner and with due care and diligence an act imposed upon him by law incurs no liability to any individual however much the latter may be injured.<sup>3</sup>

Even though the power which set him in motion may have erred, yet if the command comes from the proper source and on its face fairly requires that he should act, he may act without fear of personal consequences to himself.

§ 662. **Unconstitutional Law affords no Protection.**—But here, as has been elsewhere noted, it must be borne in mind that an unconstitutional law is, in legal effect, no law at all, and the

<sup>1</sup> Carrick v. Lamar, 116 U. S. 428; Decatur v. Paulding, 14 Pet. (U. S.) 497; United States v. Guthrie, 17 How. (U. S.) 284; United States v. Commissioner, 5 Wall. (U. S.) 568; Litchfield v. Register, 9 Wall. (U. S.) 574; Tally v. Grider, 66 Ala. 119.

<sup>2</sup> Grider v. Tally, 77 Ala. 423, 54 Am. Rep. 65; Thompson v. Holt, 52 Ala. 491; People v. Provines, 34 Cal. 520; People v. Bush, 40 Cal. 344.

<sup>3</sup> Highway Commissioners v. Ely, 54 Mich. 175; Sage v. Laurain, 19 Mich. 187.

ministerial officer can not, therefore, justify his action under it, even though he acted in good faith upon the presumed validity of the law which had not yet been declared to be unconstitutional.<sup>1</sup>

§ 663. **Officer must keep within Authority conferred by Law.**—It is self-evident, also, since the officer must justify his action, if at all, by showing that he was authorized of law so to act, that if he commits an act which his authority will not justify, or if he exceeds, ignores or disregards the limits set to his authority, he cannot then justify at all, but must respond to the party injured like any other wrongdoer.<sup>2</sup>

§ 664. **Ministerial Officer who fails to act or who acts improperly liable to Party specially injured.**—But, on the other hand, it is equally well settled that where the law imposes upon a public officer the performance of ministerial duties in which a private individual has a special and direct interest, the officer will be liable to such individual for any injury which he may proximately sustain in consequence of the failure or neglect of the officer either to perform the duty at all, or to perform it properly.

In such a case the officer is liable as well for non-feasance as for misfeasance or malfeasance.<sup>3</sup>

<sup>1</sup> *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 881; *Ely v. Thompson*, 8 A. K. Marsh. (Ky.) 70; *Osborn v. Bank*, 9 Wheat (U.S.) 738; *Norton v. Shelby County*, 118 U. S. 442; *United States v. Lee*, 106 U. S. 196; *Cunningham v. Macon R. R. Co.* 109 U. S. 446; *Polindexter v. Greenhow* (Virginia Coupon Cases) 114 U. S. 270; *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718; *Lynn v. Polk*, 8 Lea (Tenn.) 121; *Board v. McComb*, 92 U. S. 531; *Astrom v. Hammond*, 8 McLean (U. S. C. C.) 107.

<sup>2</sup> *Orr v. Quimby*, 54 N. H. 590.

<sup>3</sup> *Rowning v. Goodchild*, 2 W. Bl. 906; *Ashby v. White*, 2 Ld. Raym. 938; *Lane v. Cotton*, 1 Salk. 17; *Amy v. Supervisors*, 11 Wall. (U. S.) 186;

*Sawyer v. Corse*, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; *Bassett v. Fish*, 12 Hun (N. Y.) 209; *Piercy v. Averill*, 37 Hun 360; *Bennett v. Whitney*, 94 N. Y. 302; *Jenner v. Joliffe*, 9 Johns. (N. Y.) 881; *Adsit v. Brady*, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; *Rounds v. Mansfield*, 38 Me. 586; *Bailey v. Mayor*, 3 Hill (N. Y.) 581, 38 Am. Dec. 669; *Maxwell v. Pike*, 2 Me. 8; *McCarty v. Bauer*, 8 Kans. 237; *Wilson v. Mayor*, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 718; *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189; *Clark v. Miller*, 54 N. Y. 528, 534; *Keith v. Howard*, 24 Pick. (Mass.) 292; *Hover v. Barkhoof*, 44 N. Y. 113; *St. Joseph*



§ 665. **Same Subject—What this Rule includes.**—"Non-feasance," said Judge METCALFE,<sup>1</sup> "is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all." The rule above stated therefore includes:

1. Non-feasance, or the neglect or refusal, without sufficient excuse, to perform an act which it was the officer's legal duty to the individual to perform.<sup>2</sup>

2. Misfeasance or negligence which here as elsewhere is the failure to use, in the performance of a duty owing to the individual, that degree of care, skill and diligence which the circumstances of the case reasonably demand.<sup>3</sup>

3. Malfeasance or the doing, either through ignorance, inattention or malice, of that which the officer had no legal right to do

*Ins. Co. v. Leland*, 90 Mo. 177, 59 Am. Rep. 9; *Grider v. Tally*, 77 Ala. 423, 54 Am. Rep. 65.

<sup>1</sup> *In Bell v. Josselyn*, 8 Gray (Mass.) 309, 68 Am. Dec. 741. See also *Mecham on Agency* §§ 571, 572.

<sup>2</sup> *Grider v. Tally*, 77 Ala. 423, 54 Am. Rep. 65; *St. Joseph Ins. Co. v. Leland*, 90 Mo. 177, 59 Am. Rep. 9; *Amy v. Supervisors*, 11 Wall. (U. S.) 136; *Clark v. Miller*, 54 N. Y. 528; *Russell v. Brace*, 42 Mich. 377; *Piercy v. Averill*, 37 Hun (N. Y.) 360; *Adsit v. Brady*, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; *Governor v. Dodd*, 81 Ill. 163; *Kolb v. O'Brien*, 86 Ill. 210; *Baltimore County v. Baker*, 44 Md. 1; *Ohouteau v. Rowse*, 56 Mo. 65; *Briggs v. Coleman*, 51 Ala. 561; *Hicks v. Dorn*, 9 Abb. Pr. (N. S.) 54; *People v. Tweed*, 13 Abb. Pr. (N. S.) 80; *Hickok v. Plattsburgh*, 15 Barb. (N. Y.) 443; *Smith v. Wright*, 24 Barb. 173; *Fish v. Dodge*, 38 Barb. 173; *Mott v. Railroad Co.* 8 Bosw. 853; *Exchange F. Ins. Co. v. Canal Co.* 10 Bosw. 187; *Paulding v. Cooper*, 10 Hun (N. Y.) 22; *Bassett v. Fish*, 12 Hun 210; *Con-*

*nors v. Adams*, 13 Hun 430; *Huston v. Mayor*, 9 N. Y. 169; *Robinson v. Chamberlain*, 84 N. Y. 390, 90 Am. Dec. 718; *Hicks v. Dorn*, 42 N. Y. 53; *Hover v. Barkhoof*, 44 N. Y. 116; *McCarthy v. Syracuse*, 46 N. Y. 196; *Olmsted v. Dennis*, 77 N. Y. 333; *Ferguson v. Kinnoull*, 9 Cl. & Fin. 279; *Vose v. Reed*, 54 N. Y. 657.

<sup>3</sup> *Eslava v. Jones*, 33 Ala. 139, 3 Am. St. Rep. 699; *Kendall v. Stokes*, 3 How. (U. S.) 87; *Piercy v. Averill*, 37 Hun (N. Y.) 360; *Robinson v. Chamberlain*, 84 N. Y. 389, 90 Am. Dec. 718; *Hover v. Barkhoof*, 44 N. Y. 116; *Clark v. Miller*, 54 N. Y. 528; *Kennedy v. Ryall*, 67 N. Y. 379; *Bennett v. Whitney*, 94 N. Y. 803; *Shepherd v. Lincoln*, 17 Wend. (N. Y.) 250; *McCord v. High*, 24 Iowa 336; *Nowell v. Wright*, 3 Allen 166, 80 Am. Dec. 62; *Bailey v. Mayor*, 8 Hill (N. Y.) 531, 38 Am. Dec. 669; *McCarty v. Bauer*, 8 Kans. 237; *Henly v. Mayor of Lyme Regis*, 5 Bing. 91; *Morse v. Sweeney*, 15 Ill. App. 436; *Hayes v. Porter*, 22 Ma. 371; *Stevens v. Dudley*, 56 Vt. 163; *Wooley v. Baldwin*, 101 N. Y. 688.

at all, as where he acts without any authority whatever, or exceeds, ignores or abuses his powers.<sup>1</sup>

These three divisions cover, in a general way, all classes of defaults in the performance of ministerial duties. The particular application of these rules will appear in later sections.

§ 666. **Duty must be one which Officer may lawfully perform.**—It is self-evident that the duty which the officer is called upon to perform, or the non-performance of which is complained of, must be one which the officer could lawfully perform. The law does not permit, much less require, its own violation.

§ 667. **Duty of Officer must be absolute.**—It also follows from the very nature of the case that the duty, the violation of which is complained of, must be one which the law imposes upon the officer absolutely, for no action can, as has been seen, arise from the non-performance of that, the doing or not doing of which rested in the officer's judgment or discretion.<sup>2</sup>

The party suing must show a plain duty violated.<sup>3</sup>

§ 668. **Duty of Officer must be personal.**—The duty must also be one which the particular officer in question, as distinguished from all other officers, was, either by virtue of an express enactment, or of a lawful demand, or of a personal undertaking, or otherwise, under a legal obligation to perform.<sup>4</sup>

§ 669. **Officer must have legal Authority and Ability to perform.**—So, obviously, the duty must be one which the officer has legal authority to perform, irrespective of superior officers;<sup>5</sup> and, where its performance requires the possession or use of particular means or agencies or the expenditure of money, it must appear that the officer had either the means, agencies or funds required, or the facilities for acquiring them.<sup>6</sup>

<sup>1</sup> Jewell v. Swain, 57 N. H. 506; Taylor v. Jones, 42 N. H. 25; Griel v. Hunter, 40 Ala. 549; Brackett v. Vining, 49 Me. 356; Melville v. Brown, 15 Mass. 81; Snyder v. Brosse, 51 Ill. 357, 99 Am. Dec. 551; Wallis v. Truesdell, 6 Pick. (Mass.) 455; Smith v. Gates, 21 Pick. 55; Williamson v. Dow, 22 Me. 559; Sawyer v. Wilson, 61 Me. 539; Handy v. Clippert, 50 Mich. 355.

<sup>2</sup> See *ante*, § 594.

<sup>3</sup> Fitzpatrick v. Slocum, 89 N. Y. 353.

<sup>4</sup> Nowell v. Wright, 3 Allen (Mass.) 166, 80 Am. Dec. 62.

<sup>5</sup> Nowell v. Wright, 3 Allen (Mass.) 166, 80 Am. Dec. 62; Hover v. Barkhoof, 44 N. Y. 118; Adair v. Brady, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; Robinson v. Chamberlain, 84 N. Y. 389, 90 Am. Dec. 713.

<sup>6</sup> Nowell v. Wright, 3 Allen (Mass.)

§ 670. **Mistake or good Faith no Excuse.**—It is no defense to such an officer, upon whom the law has imposed the positive duty of performance, that he was mistaken as to the nature or extent of his obligation, or that he acted in entire good faith and with an honest intention to do his duty.<sup>1</sup>

§ 671. **That Violation is punishable no Defence.**—That the failure of performance is by law made a penal offence is no bar to the maintenance of an action by the individual injured.<sup>2</sup>

§ 672. **No Excuse that Duty was owing primarily to Public if Individual has special Interest.**—So it is immaterial that the duty is one primarily imposed upon public grounds and therefore a duty owing primarily to the public, if, notwithstanding, the individual has in it a distinctive and direct interest and the legal right to require its performance; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance against which it was in part the purpose of the law to protect him.<sup>3</sup>

§ 673. **But no Liability where Duty is owing solely to Public.**—But, as has been seen, where the duty is one owing solely to the public, no liability for its non-performance is incurred to the individual however much he may be injured.<sup>4</sup>

§ 674. **Party suing must show Injury from Breach of Duty owing to himself.**—It is largely a restatement of the same rule to say that the individual suing must show that he has suffered an injury from the breach of a duty owing to himself. It is not enough that he has sustained an injury, or that the officer has violated a duty owing to some one; but the plaintiff must show that these two things concur: that he has sustained a special and peculiar injury, and that it results from a breach of duty which the officer owed to him.<sup>5</sup>

166, 80 Am. Dec. 62; *Hover v. Barkhoof*, 44 N. Y. 118; *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Weed v. Ballston Spa*, 76 N. Y. 829; *Hines v. Lockport*, 50 N. Y. 288.

<sup>1</sup> *Amy v. Supervisors*, 11 Wall. (U. S.) 136.

<sup>2</sup> *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189; *Hayes v. Porter*, 22 Me. 371.

<sup>3</sup> Per COOLEY, J. in *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189. The decision in this case was dissented from in *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169.

<sup>4</sup> See *ante*, § 598.

<sup>5</sup> *Ealava v. Jones*, 83 Ala. 139, 3 Am. St. Rep. 699; *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169. In this case, ELLIOTT, J. states the rule with

§ 675. Only proximate Damages can be recovered.—In actions against officers, as in other cases, the injury sustained and

so much fullness and clearness as to seem to warrant the following extract from his opinion: "It is not enough in any case for a plaintiff, who seeks to recover for an injury caused by the negligence of another, to show simply injury and negligence; he must also show that there was a breach of duty owing to him. This general rule applies with peculiar force to persons who sue for injuries caused by official misconduct. It is not every person who sustains an injury from the negligence of a public officer that can maintain an action on the officer's bond.

In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of particular duty owing to him. It is not sufficient to show a general public duty, or a duty to some other person directly interested. Judge COOLEY says: 'But the sheriff can only be liable to the person to whom the particular duty was owing; the party to whom he is bound by the duty of his office.' Cooley on Torts, 894, n. 1. In another elementary treatise it is said: 'It is a general rule that wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he has an interest in the performance of the duty, and that the duty was imposed for his benefit.' Shearm. & Redf. Neg. § 174.

The adjudged cases illustrate and enforce this principle. In *Harrington v. Ward*, 9 Mass. 251, it was said: 'No action lies against the sheriff, either for his own default or for that of his deputy, but at the suit of one

to whom the sheriff is bound by the duty of his office. In relation to a suit pending, whether in the service of the original writ, the execution or any intermediate process, he is answerable for his neglects to none but the plaintiff or the defendant in such suit.' The same principle is laid down in the cases of *Compton v. Pruitt*, 88 Ind. 171; *Gardner v. Heartt*, 8 Denio (N. Y.) 282, and *Bank of Rome v. Mott*, 17 Wend. (N. Y.) 554. In the last case cited, COWEN, J., said: 'The law can not, in such cases, look beyond the proximate mischief resulting to a vested right, and do more than redress that mischief at the suit of the person immediately wronged.'

The case of *Strong v. Campbell*, 11 Barb. (N. Y.) 135, is an interesting and instructive one. It appeared in that case that a statute provided for the publication of the list of uncalled for letters, and that it should be made in the newspaper having the largest circulation in the town. Plaintiffs were publishers of such a paper; publication of the list was denied them, and it was held that they could not maintain an action, the court saying: 'To give a right of action for such a cause, the plaintiff must show that the defendant owed the duty to him personally. Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit.'

If we look to kindred cases we shall find strong support for this view, for the analogy is close and full. Thus in cases against attorneys for negligence, it is well settled that only

the damages claimed must be the proximate and not the remote result of the breach of duty complained of.<sup>1</sup>

§ 676. *De Facto Officer liable for Negligence.*—As has already been seen, the *de facto* officer is liable to third persons for

the person with whom the attorney contracted can maintain the action, for it is to him alone that he owes a particular duty. *Fish v. Kelly*, 17 C. B. (N. S.) 194; *Savings Bank v. Ward*, 100 U. S. 195; *Commonwealth v. Harmer*, 6 Phila. 90; *Robertson v. Fleming*, 4 Macq. App. Cas. 167.

In *Ware v. Brown*, 2 Bond (U. S. D. C.) 267, a notary public had made a false certificate to a deed, and it was held that no one but the party to the original deed could maintain an action. So where a recorder gives an erroneous certificate, an action can be maintained only by the person to whom it was given. *Houseman v. Girard, &c. Assn.* 81 Penn. St. 256; *Wood v. Ruland*, 10 Mo. 143. Builders of public works are answerable only to their employers for want of skill and care in executing their contract: *Mayor v. Cunliff*, 2 N. Y. 165; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Castle v. Parker*, 18 L. T. Rep. (N. S.) 867. A railway company is not liable to an interloper for injuries resulting from negligence: *Lary v. Cleveland, &c. R. Co.* 78 Ind. 823; 41 Am. Rep. 572; *Everhart v. Terre Haute, &c. R. Co.* 78 Ind. 292, 41 Am. Rep. 567.

In *Winterbottom v. Wright*, 10 M. & W. 109, the plaintiff proved that a mail coach had been defectively constructed; that it was constructed under a contract with a public officer, and that because of its defective construction plaintiff sustained an injury; and the court denied a recovery upon the ground that the coachmaker owed plaintiff no duty: Lord ABINGER, in the course of his opinion, said: 'Unless we confine the operation of such

contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.' This corresponds with Judge CLIFFORD's statement that 'There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect.' *Savings Bank v. Ward, supra.*

In *Dale v. Grant*, 5 Vroom (N. J.) 142, it was held that an action would not lie in favor of a customer against a wrong-doer who stopped the machinery of a manufactory and prevented the manufacturer from performing a contract, and thereby caused loss to the plaintiff, to whom the manufacturer had agreed to furnish goods. The court said: 'But the law does not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs and who may have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*.' Interesting discussions of kindred questions are contained in *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543, and *Anthony v. Slaid*, 11 Metc. 290."

<sup>1</sup> *Eslava v. Jones*, 83 Ala. 189, 8 Am. St. Rep. 699; *Winterbottom v. Wright*, 10 M. & W. 109; *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169.

negligence or malfeasance in the performance of the duties of the office assumed by him, or for not completing a service which he has officially undertaken, in the same manner and to the same extent as though his title to the office were perfect.<sup>1</sup>

§ 677. **Presumption of due Performance.**—As has also been seen, it is a presumption constantly attending the performance of official duty, that the officer has not neglected his duty, nor misapplied nor abused his powers.<sup>2</sup> The burden of proving the default complained of rests therefore upon the party alleging it.<sup>3</sup>

§ 678. **Subordinate Officers are liable for their own Defaults.**—The rule of liability for official misconduct applies as well to inferior and subordinate officers as to those of higher rank. As will be seen in a subsequent section,<sup>4</sup> public officers of government are held, with certain exceptions there stated, to be not liable for the defaults of their official subordinates. Such inferior officers are themselves public officers, and are personally liable for their own defaults.<sup>5</sup>

§ 679. **Liability of Deputies.**—So, though their principals may be liable also, deputy officers are personally liable to third persons for their acts of misfeasance or malfeasance.<sup>6</sup> Such acts

<sup>1</sup> See *ante*, § 338.

*Allen v. Archer*, 49 Me. 346; *Bearce v. Fossett*, 34 Me. 575; *Longacre v. State*, 3 Miss. 637; *Sandwich v. Fish*, 2 Gray (Mass.) 298; *Williamson v. Willis*, 15 Gray (Mass.) 437; *Johnston v. Wilson*, 2 N. H. 202; *Horn v. Whittier*, 6 N. H. 88; *Jones v. Scanland*, 6 Humph. (Tenn.) 195; *Trescott v. Moan*, 50 Me. 347; *Wentworth v. Gove*, 45 N. H. 160; *Billingsley v. State*, 14 Md. 369; *Borden v. Houston*, 2 Tex. 594.

<sup>2</sup> See *ante*, § 579.

*Dunlop v. Munroe*, 1 Cranch O. O. 586; *People v. Auditor*, 2 Scam. (Ill.) 567; *Vaughn v. Biggers*, 6 Ga. 188; *Strother v. Lucas*, 12 Pet. (U. S.) 410; *Ross v. Reed*, 1 Wheat. (U. S.) 482; *United States v. Arredondo*, 6 Peters, 691; *Philadelphia, &c. R. R. Co. v. Stimpson*, 14 Peters, 448; *Delassus v. United States*, 9 Peters 117;

*Wilkes v. Dinsman*, 7 How. (U. S.) 89; *Minter v. Crommelin*, 18 How. (U. S.) 87; *Mandeville v. Reynolda*, 68 N. Y. 528; *Sutherland v. Ingalls*, 68 Mich. 620, 6 Am. St. Rep. 332.

<sup>3</sup> *National Bank v. Herold*, 74 Cal. 303, 5 Am. St. Rep. 476.

<sup>4</sup> *Post*, § 789.

<sup>5</sup> *Keenan v. Southworth*, 110 Mass. 474, 14 Am. Rep. 614; *Robertson v. Sichel*, 127 U. S. 507; *Conwell v. Voorhees*, 18 Ohio 528, 42 Am. Dec. 206; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 249; *Dunlop v. Munroe*, 7 Cranch (U. S.) 242; *Schroyer v. Lynch*, 8 Watts (Penn.) 453; *Bishop v. Williamson*, 11 Me. 495.

<sup>6</sup> *Purrrington v. Loring*, 7 Mass. 388; *Ross v. Philbrick*, 39 Me. 29; *Remlinger v. Weyker*, 23 Wis. 383.

would render the principal liable if performed by him in person and the deputy can not, it is evident, find justification for the performance of an unlawful act in the order or command of a principal who had himself no legal authority either to perform or direct it.

For acts of non-feasance,<sup>1</sup> however, *i. e.* for the non-performance of a duty owing to his principal, the deputy is, it is held, liable to his principal only, and the latter alone must answer for it to the person injured.<sup>2</sup>

Whether the deputy and his principal can be held jointly liable for the deputy's misfeasance or malfeasance is a question upon which the authorities are not agreed.

§ 680. **Effect of contributory Negligence.** — "That public officers should be held to a faithful performance of their official duties," it is said in one case, "and made to answer in damages to all persons who may have been injured through their malfeasance, omission or neglect, to which the persons injured have in no respect contributed, cannot be denied. But it is equally true that if the result complained of would have followed, notwithstanding their misconduct, or if the injured party himself contributed to the result in any degree by his own fault or neglect, they cannot be held responsible. If the position of the injured party would have been just the same had not the alleged misconduct occurred, he has no legal ground of complaint; and if his own conduct or the conduct of his attorney contributed to the result, he is *in pari delicto*, and the law leaves him where it finds him."<sup>3</sup>

§ 681. **Liability when Services are gratuitous.**—In the case of many public officers, the compensation provided for their services is a fixed salary payable out of the public treasury, and they are required by law to render their services to such individuals as are legally entitled to them without any further com-

<sup>1</sup> See, as to the distinction, *Mechem on Agency*, §§ 569-572.

<sup>2</sup> *McNutt v. Livingston*, 7 Sm. & M. (Miss.) 641; *Snedicor v. Davis*, 17 Ala. 473; *Cameron v. Reynolds*, Cowp. 403; *Buck v. Ashley*, 37 Vt. 475; *Rose v. Lane*, 3 Humph. (Tenn.)

218; *Paddock v. Cameron*, 8 Cow. (N. Y.) 212; *Armistead v. Marks*, 1 Wash. (Va.) 325.

<sup>3</sup> *Lick v. Madden*, 36 Cal. 208, 25 Am. Dec. 175; *Boardman v. Hayne*, 29 Iowa 346.

pensation or reward. So also there are cases where the office is expressly made a gratuitous one with no salary or compensation attached, and the officer who accepts such an office would be bound by law to act, for those legally entitled to require his action, without compensation.

The great majority of purely ministerial officers, however, are compensated by fees payable by each individual who requires their services. These fees the officer may lawfully require to be pre-paid to him before he undertakes the service, and may, without liability, refuse to act until they are paid.<sup>1</sup> But, as this provision is for his own benefit, he may waive it if he pleases, and if, without requiring his fees to be prepaid, he undertakes the service, he will then be held to the same liability as though he had been paid. Having assumed the service, the trust and confidence reposed furnish a sufficient consideration for his implied undertaking to perform it properly.<sup>2</sup>

§ 682. *Liability of Officer upon his Bond.*—The bonds given by public officers are required and given to secure the faithful discharge by the officer of the official duties which the law imposes upon him. They are given to indemnify the public and individuals having occasion to deal with him against the consequences of his unlawful action or inaction as an *officer* and not as a private *individual*, and they are far from being security for his general good conduct, or protection against every act which the officer may commit.<sup>3</sup>

To give a cause of action, therefore, upon the officer's bond for his inaction, it must appear that the act left unperformed was one which it was his official duty to perform; and to give a cause of action for the doing of an act which, it is alleged, he ought not to have done, it must appear that the act complained of was one which it was official duty not to perform.

The liability of the officer upon his bond is, where no special defense is open to the sureties, co-extensive with the liability of

<sup>1</sup> Ripley v. Gifford, 11 Iowa 867.

<sup>2</sup> See Mechem on Agency, § 478; Passano v. Acosta, 4 La. 26, 28 Am. Dec. 470; Williams v. Higgins, 80 Md. 404; Short v. Skipwith, 1 Brock. C. C. 104; Walker v. Smith, 1 Wash.

C. C. 152; Spence v. Towles, 18 Mich. 9; Williams v. Higgins, 80 Md. 404.

<sup>3</sup> State v. Conover, 28 N. J. L. 280; Commonwealth v. Cole, 7 B. Mon. (Ky.) 250, 46 Am. Dec. 506.



the sureties thereon,—a question already discussed.<sup>1</sup> The officer may be liable to a greater extent as an individual, but his liability upon his bond is limited to a breach of its conditions.

## II.

### LIABILITY OF PARTICULAR OFFICERS.

§ 683. *In General.*—Having thus considered the general principles applicable to the subject of this chapter, some illustrations of their application to the case of particular officers will now be given. It is obviously impossible to instance every case in which a ministerial officer may be held liable, but sufficient will be given to illustrate the principles. In many of the cases which will be noticed, the officer might, perhaps, have been as properly classed under the head of the *quasi-judicial*, but inasmuch as they are all called upon to perform duties often, if not chiefly, of a ministerial nature, no confusion will, it is believed, result from the classification here adopted.

#### 1. *Assignee in Bankruptcy.*

§ 684. *Liable for Neglect of prescribed Duties.*—An assignee in bankruptcy is liable in damages to creditors of the bankrupt if he wilfully omits or improperly performs official duties which are clearly prescribed and do not involve the exercise of discretion or judicial powers, as where he wilfully omits to give them notice of a meeting with the intent to injure them; and it seems that State courts have jurisdiction of the action against him.<sup>2</sup>

#### 2. *Canal Contractors.*

§ 685. *Are liable for Injury from Defaults.*—Canal contractors in New York are public ministerial officers<sup>3</sup> and are liable to individuals injured by reason of their failure to keep the canal in repair<sup>4</sup> or free from obstructions to navigation,<sup>5</sup> or for negligence

<sup>1</sup> See *ante*, § 283 *et seq.*

<sup>2</sup> Russell v. Phelps, 49 Mich. 377.

<sup>3</sup> Robinson v. Chamberlain, 84 N. Y. 389, 90 Am. Dec. 718.

<sup>4</sup> Robinson v. Chamberlain, 84 N. Y. 389, 90 Am. Dec. 718; Hicks v.

Dorn, 43 N. Y. 47; Conroy v. Gale, 47 N. Y. 665; Fulton F. Ins. Co. v. Baldwin, 37 N. Y. 648; French v. Donaldson, 57 N. Y. 496.

<sup>5</sup> Hicks v. Dorn, 54 Barb. 172, 43

in the construction of the work,<sup>1</sup> or for trespassing upon private property.<sup>2</sup>

### 3. *Clerks of Courts.*

§ 686. Are liable for ministerial Defaults.—Clerks of courts exercise chiefly ministerial functions, and are liable in damages to the person injured by their omissions or neglects, as where they take or approve insufficient bonds or security,<sup>3</sup> or are negligent in filing papers,<sup>4</sup> or carelessly give a false certificate,<sup>5</sup> or neglect to enter a cause upon the docket,<sup>6</sup> or to issue a writ or file a bill of exceptions in a proper case,<sup>7</sup> or refuse without sufficient reason to issue proper process,<sup>8</sup> or are negligent in entering up a judgment.<sup>9</sup>

But no action lies against a clerk upon his official bond for the recovery of damages sustained by a father by reason of the marriage of his minor daughter under a license unlawfully issued by the clerk without the father's consent.<sup>10</sup>

§ 687. Duty to allow Inspection of Records.—It is the duty of the clerk to permit persons having a present or prospective interest in particular public records in his office to inspect and copy the same at reasonable times and under reasonable regulations.<sup>11</sup> The performance of this duty may be enforced by man-

N. Y. 47; *Fulton F. Ins. Co. v. Baldwin*, 87 N. Y. 648.

<sup>1</sup> *St. Peter v. Denison*, 58 N. Y. 416.

<sup>2</sup> *Hicks v. Dorn*, 43 N. Y. 47.

<sup>3</sup> *Topping v. Windley*, 99 N. C. 4, 5 S. E. Rep. 14; *McNutt v. Livingston*, 7 Smedes & M. (Miss.) 641; *Billings v. Lafferty*, 81 Ill. 818; *Hubbard v. Switzer*, 47 Iowa 681; *Haverly v. McClelland*, 57 Iowa 183; *Brock v. Hopkins*, 5 Neb. 281.

<sup>4</sup> *Rosenthal v. Davenport*, 38 Minn. 543, 38 N. W. Rep. 618.

<sup>5</sup> *Maxwell v. Pike*, 2 Me. 8.

<sup>6</sup> *Brown v. Lester*, 18 Smedes & M. (Miss.) 392.

<sup>7</sup> *Collins v. McDaniel*, 66 Ga. 203.

<sup>8</sup> *Anderson v. Johett*, 14 La. Ann. 614.

<sup>9</sup> *Governor v. Dodd*, 81 Ill. 168.

<sup>10</sup> *Holland v. Beard*, 59 Miss. 161, 43 Am. Rep. 360, overruling *State v. Baker*, 47 Miss. 88, and disapproving *White v. Henry*, 24 Me. 581.

<sup>11</sup> *Boylan v. Warren*, 39 Kans. 301, 7 Am. St. Rep. 551; *In re McLean*, 8 The Rep. 818; *Lum v. McCarty*, 39 N. J. L. 287 (overruling *Flemming v. Clerk*, 30 N. J. L. 280). See also *Buck v. Collins*, 51 Ga. 395; *Bean v. People*, 7 Col. 203; *German American Loan & Trust Co. v. Richards*, 99 N. Y. 630; *Hanson v. Eichstaedt*, 69 Wis. 538; *State v. Rachac*, 37 Minn. 873; *State v. Williams*, 96 Mo. 18, 8 S. W. Rep. 711; *State v. Hoblitzelle*, 85 Mo. 624.

For a full discussion of this gen-

damus,' or, for an unlawful refusal to perform it, an action may be maintained.<sup>2</sup>

But the party demanding inspection must have some other interest than mere curiosity,<sup>3</sup> and the injury complained of must have been the proximate result of the refusal.<sup>4</sup>

§ 688. **Duty to furnish Copies of Records.**—So it is frequently made the duty of the clerk to furnish copies of particular records to parties desiring them upon the payment of a prescribed fee. The performance of this duty, also, may be enforced by mandamus,<sup>5</sup> or, for its non-performance, an action may be maintained.<sup>6</sup>

So it is his duty to use reasonable diligence to make true and perfect copies, and for negligence in this regard he would also be liable.<sup>7</sup>

#### 4. *Collector of Taxes.*

§ 689. **Must act by Warrant.**—The collector of taxes is a ministerial officer whose duty it is to collect of the persons and in the amounts set down in his warrant the taxes which have been assessed by the proper officers. The warrant for their collection received from the constituted authority is the process by which he is to proceed. It alone confers authority upon him to act and without it he is a trespasser.<sup>8</sup>

§ 690. **Protected by Process fair on its Face.**—The collector of taxes has, ordinarily, nothing to do with their assessment, and in no case has he authority to revise, review or refuse to collect

eral question, see the title *Recorders of Deeds, post*.

<sup>1</sup> *Boylan v. Warren, supra*.

<sup>2</sup> *Lyman v. Windsor*, 24 Vt. 575; *Lyman v. Edgerton*, 29 Vt. 305, 70 Am. Dec. 415; *Lum v. McCarty*, 89 N. J. L. 287.

<sup>3</sup> *Randolph v. State*, 83 Ala. 527, 60 Am. Rep. 761. Upon this point see *Burton v. Tuite*, — Mich. —, 44 N. W. Rep. — (not yet reported).

<sup>4</sup> *Lyman v. Edgerton*, 29 Vt. 305, 70 Am. Dec. 415.

<sup>5</sup> *Strong's Case*, Kirby (Conn.) 345;

*Ex parte Goodell*, 14 Johns. (N. Y.) 325; *Silver v. People*, 45 Ill. 225.

<sup>6</sup> *Boyden v. Burke*, 14 How. (U.S.) 576

<sup>7</sup> See *Smith v. Holmes*, 54 Mich. 104; *Chase v. Heaney*, 70 Ill. 268; *Clark v. Marshall*, 84 Mo. 439; *Savings Bank v. Ward*, 100 U. S. 195.

<sup>8</sup> *Hilbish v. Hower*, 58 Penn. St. 93, citing *Pearce v. Torrence*, 2 Grant's Cas. 83; *Stephens v. Wilkins*, 6 Penn. St. 260. To like effect: *Donald v. McKinnon*, 17 Fla. 746; *Taft v. Barrett*, 58 N. H. 447; *Pearson v. Canney*, 64 Me. 188.

them. His duty is simply to make the collection in accordance with his warrant without questioning the legality of the action which has preceded his.

It is, therefore, the well settled rule that the collector of taxes legally qualified and acting within the scope of his authority, by virtue of a warrant coming from the proper officers and which is legal in form and on its face contains nothing by way either of recitals or omissions to apprise him that it was issued without legal authority, will be protected in such action against all illegalities except his own.<sup>1</sup>

<sup>1</sup> Nowell v. Tripp, 61 Me. 426, 14 Am. Rep. 572; Judkins v. Reed, 48 Me. 386; Caldwell v. Hawkins, 40 Me. 526; Ford v. Clough, 8 Me. 842, 23 Am. Dec. 518; Kellar v. Savage, 20 Me. 199; State v. McNally, 84 Me. 210, 56 Am. Dec. 650; Tremont v. Clark, 33 Me. 422; Bethel v. Mason, 55 Me. 501; Bird v. Perkins, 33 Mich. 28; Wall v. Trumbull, 16 Mich. 228; Savacool v. Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; Chegaray v. Jenkins, 5 N. Y. 876; McGuinity v. Herrick, 5 Wend. 240; Wilcox v. Smith, 5 Wend. 231, 21 Am. Dec. 213; Alexander v. Hoyt, 7 Wend. 89; Beach v. Furman, 9 Johns. (N. Y.) 228; Coon v. Congden, 12 Wend. 496; Bennett v. Burch, 1 Denio (N. Y.) 141; Webber v. Gay, 24 Wend. 485; Abbott v. Yost, 2 Denio 86; Dunlap v. Hunting, 2 Denio 642, 43 Am. Dec. 763; Cornell v. Barnes, 7 Hill (N. Y.) 85; People v. Warren, 5 Hill 440; Sheldon v. Van Buskirk, 2 N. Y. 473; Turner v. Franklin, 29 Mo. 285; Glasgow v. Rowse, 43 Mo. 479; St. Louis & Co., Assn. v. Lightner, 47 Mo. 898; State v. Dulle, 48 Mo. 282; Walden v. Dudley, 49 Mo. 419; Ranney v. Bader, 67 Mo. 476; Holden v. Eaton, 8 Pick. (Mass.) 436; Colman v. Anderson, 10 Mass. 105; Sprague v. Bailey, 19 Pick. (Mass.) 436; Upton v. Holden, 5

Metc. (Mass.) 860; Lincoln v. Worcester, 8 Cush. (Mass.) 55; Aldrich v. Aldrich, 8 Metc. 103; Hays v. Drake, 6 Gray (Mass.) 387; Howard v. Proctor, 7 Gray 128; Williamstown v. Willis, 15 Gray 427; Cheever v. Merritt, 5 Allen (Mass.) 563; Underwood v. Robinson, 106 Mass. 296; Brainerd v. Head, 15 La. Ann. 489; Blanchard v. Goss, 2 N. H. 491; Henry v. Sargent, 13 N. H. 821, 40 Am. Dec. 146; State v. Weed, 21 N. H. 262, 53 Am. Dec. 188; Rice v. Wadsworth, 27 N. H. 104; Keniston v. Little, 30 N. H. 318, 64 Am. Dec. 297; Kelley v. Noyes, 43 N. H. 209; Moore v. Allegheny City, 18 Penn. St. 55; Billings v. Russell, 23 Penn. St. 189, 62 Am. Dec. 380; Cunningham v. Mitchell, 67 Penn. St. 78; Shaw v. Dennis, 5 Gilm. (Ill.) 405; Hill v. Figley, 25 Ill. 156; Allen v. Scott, 13 Ill. 80; Loomis v. Spencer, 1 Ohio St. 153; Thames Manuf. Co. v. Lathrop, 7 Conn. 550; Watson v. Watson, 9 Conn. 140, 23 Am. Dec. 824; Neth v. Crofut, 30 Conn. 580; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Prince v. Thomas, 11 Conn. 472; McLean v. Cook, 23 Wis. 364; Noland v. Busby, 28 Ind. 154; LeRoy v. East Saginaw C. Ry. Co., 18 Mich. 233, 100 Am. Dec. 162; Lott v. Hubbard, 44 Ala. 598; State v. Lutz, 65 N. C. 508; Gore v. Mastin, 66 N. C.

The same rule protects a collector of internal revenue under like circumstances.<sup>1</sup>

§ 691. **Effect of extrinsic Knowledge of Defects.**—Whether the officer would be protected where, at the time of execution of his process, he had knowledge from other sources of the invalidity of the action upon which it is based, is a question upon which the authorities are not completely in harmony, but the weight of authority seems to be that he would be protected.<sup>2</sup>

§ 692. **Collector not protected if Warrant not fair on its Face.**—The converse of the general rule is equally true, for if the warrant is not fair upon its face, as where it manifestly lacks an element required by the statute,<sup>3</sup> or shows that the tax is not one which could lawfully be collected,<sup>4</sup> or appears to be issued by the wrong officer,<sup>5</sup> or to have been issued too soon,<sup>6</sup> it will afford the officer no protection.

§ 693. **Collector liable if he exceeds or abuses his Authority.**—But here, as in other cases, the protection of his process extends to the officer only while acting in pursuance of it and within the scope of his authority. For if he commits acts which his process though valid would not justify, as if he acts without any authority at all,<sup>7</sup> or exceeds his authority,<sup>8</sup> or abuses his powers,<sup>9</sup> or seizes the property of one person to satisfy the

871; *Erskine v. Hohnbach*, 14 Wall. (U. S.) 618; *Bailey v. Railroad Co.* 22 Wall. 604; *Byles v. Genung*, 52 Mich. 504.

<sup>1</sup> *Erskine v. Hohnbach*, 14 Wall. (U. S.) 618.

<sup>2</sup> *Wall v. Trumbull*, 16 Mich. 228; *Bird v. Perkins*, 33 Mich. 28; *Rainey v. State*, 20 Tex. App. 455; *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324; *Webber v. Gay*, 24 Wend. (N. Y.) 485; *Wilmarth v. Burt*, 7 Metc. (Mass.) 257.

*Contra*, *Grace v. Mitchell*, 81 Wis. 538, 11 Am. Rep. 613; *Leachman v. Dougherty*, 81 Ill. 324.

<sup>3</sup> *Warrensburg v. Miller*, 77 Mo. 56; *Van Rensselaer v. Witbeck*, 7 N. Y. 517.

<sup>4</sup> *Eames v. Johnson*, 4 Allen (Mass.) 363.

<sup>5</sup> *Chalker v. Ives*, 55 Penn. St. 81.

<sup>6</sup> *Westfall v. Preston*, 49 N. Y. 349.

<sup>7</sup> *Hilbish v. Hower*, 58 Penn. St. 98; *Gale v. Mead*, 4 Hill (N. Y.) 109; *Donald v. McKinnon*, 17 Fla. 746.

<sup>8</sup> *Williamson v. Dow*, 32 Me. 559. As where he sells more property than is necessary to satisfy the tax, he is a trespasser as to the excess: *Seekins v. Goodale*, 61 Me. 400, 14 Am. Rep. 568; *Cone v. Forest*, 126 Mass. 97.

<sup>9</sup> *Blake v. Johnson*, 1 N. H. 91. Keeping the property longer than the specified time before sale renders the officer a trespasser: *Brackett v. Vining*, 49 Me. 356. See also *Pierce v. Benjamin*, 14 Pick. (Mass.) 366, 25

tax against another,<sup>1</sup> he is liable in damages to the party injured.

§ 694. **Liability for Money received on void Process.**—Where money illegally collected by color of law still remains in the hands of the collector it may be recovered from him by the party paying it,<sup>2</sup> but if it has been paid over by the collector to the proper authorities, he is no longer responsible for it though it appears that he acted under an authority which was void.<sup>3</sup>

### 5. Election Officers.

§ 695. **Inspectors.**—As has been already seen,<sup>4</sup> inspectors of elections are usually held to act in at least a *quasi*-judicial capacity in determining the qualifications of an elector, and for an erroneous decision are liable,<sup>5</sup> and, except in Massachusetts<sup>6</sup> and Ohio,<sup>7</sup> liable only,<sup>8</sup> where they have acted wilfully, corruptly or maliciously.

Am. Dec. 396; *Noyes v. Haverhill*, 11 Cush. (Mass.) 338; or seizing property too soon: *Veit v. Graff*, 37 Ind. 253; or selling it before the time fixed: *Buzzell v. Johnson*, 54 Vt. 90; or falsely returning *nulla bona*: *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 169; but see *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169.

<sup>1</sup> *Hurlburt v. Green*, 41 Vt. 490.

<sup>2</sup> See *Mechem on Agency*, § 561; *Hardesty v. Fleming*, 57 Tex. 395.

<sup>3</sup> *Dickins v. Jones*, 6 Yerg. (Tenn.) 433; *Crutchfield v. Wood*, 16 Ala. 702; *Lewis County v. Tate*, 10 Mo. 650. But see *Wood v. Stirman*, 37 Tex. 534.

<sup>4</sup> See *ante*, § 639.

<sup>5</sup> Liable when malicious or corrupt: *Friend v. Hamill*, 34 Md. 298; *Elbin v. Wilson*, 33 Md. 135; *Weckerley v. Geyer*, 11 Serg. & R. (Penn.) 35; *Caulfield v. Bullock*, 18 B. Mon. (Ky.) 495; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; *Bridge v. Oakley*, 2 La. Ann. 968; *Patterson v.*

*D'Auterive*, 6 La. Ann. 467, 54 Am. Dec. 564; *Pike v. Megoun*, 44 Mo. 491; *Bernier v. Russell*, 39 Ill. 60.

<sup>6</sup> Liable though neither corruption or malice is charged: *Lincoln v. Hapgood*, 11 Mass. 350, 355; *Kilham v. Ward*, 2 Mass. 236; *Capen v. Foster*, 12 Pick. (Mass.) 485, 28 Am. Dec. 633; *Henshaw v. Foster*, 9 Pick. 312; *Keith v. Howard*, 24 Pick. 292; *Blanchard v. Stearns*, 5 Metc. (Mass.) 298; *Larned v. Wheeler*, 140 Mass. 390, 54 Am. Rep. 433; *Lombard v. Oliver*, 3 Allen (Mass.) 1; *Gates v. Neal*, 23 Pick. 308; *Bacon v. Benchley*, 2 Cush. (Mass.) 100.

<sup>7</sup> Massachusetts rule prevails in Ohio; *Jeffries v. Ankeny*, 11 Ohio 372; *Anderson v. Millikin*, 9 Ohio St. 568; *Monroe v. Collins*, 17 Ohio St. 665.

<sup>8</sup> Liable only when malicious or corrupt: *Bevard v. Hoffman*, 18 Md. 479, 31 Am. Dec. 618; *Anderson v. Baker*, 23 Md. 531; *Gordon v. Farrar*, 2 Doug. (Mich.) 411; *Jenkins v. Wal-*

In some States, however, it has been deemed the better policy to make the elector himself responsible for the possession of the necessary qualifications and to constitute his taking of an oath prescribed the test of his capacity. In such States, the inspectors have no judicial powers to exercise. If the oath is taken, it is their duty to receive the vote. In this they act ministerially merely, and are liable if they wrongfully refuse to receive it, even though they had no ill motive.<sup>1</sup>

§ 696. **Registration Officers.**—The same principles govern the liability of registration officers. Where they are called upon by law to pass upon the qualifications of one claiming to be entitled to registration as a voter, they would be liable for an erroneous decision only when their action was wilful or corrupt.<sup>2</sup>

If, however, the taking of a prescribed oath by the applicant was by law made the test of his eligibility, their action in administering the oath and in registering his name would be ministerial merely and they would be liable for erroneous action though their motives were good.<sup>3</sup>

§ 697. **Canvassers.**—The duties of boards of canvassers are purely ministerial.<sup>4</sup>

§ 698. **Inducting Officers.**—So it is held that an action can not be maintained against the officers whose duty it is to accept an officer's bond and induct him to the office where they have, in good faith, refused to do so on the ground that he was ineligible. But if their action was inspired by malice or was designed to accomplish any unlawful end, it was held that the action would lie.<sup>5</sup>

dron, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; Morgan v. Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Chrisman v. Bruce, 1 Duval (Ky.) 63, 85 Am. Dec. 603; Goetcheus v. Matthewson, 61 N. Y. 420; Miller v. Rucker, 1 Bush (Ky.) 135; Carter v. Harrison, 5 Blackf. (Ind.) 138; Rail v. Potts, 8 Humph. (Tenn.) 225; Wheeler v. Patterson, 1 N. H. 88, 8 Am. Dec. 41; Peavey v. Robbins, 3 Jones (N. C.) L. 339; Fausler v. Parsons, 6 W. Va. 436, 20 Am. Rep. 431; Dwight v. Rice, 5 La. Ann. 530; Keenan v. Cook, 12 R. I. 52.

<sup>1</sup> Gillespie v. Palmer, 20 Wis. 544; Goetcheus v. Matthewson, 61 N. Y. 420, reversing 5 Lana. 214; Spragins v. Houghton, 3 Ill. 377.

<sup>2</sup> Fausler v. Parsons, 6 W. Va. 436, 20 Am. Rep. 431.

<sup>3</sup> See Goetcheus v. Matthewson, 61 N. Y. 420; Gillespie v. Palmer, 20 Wis. 544.

<sup>4</sup> People v. Van Cleave, 1 Mich. 363, 58 Am. Dec. 69; People v. Cloott, 16 Mich. 233, 321, 97 Am. Dec. 141; People v. Hilliard, 29 Ill. 433.

<sup>5</sup> Hannon v. Grizzard, 96 N. C. 293.

6. *Highway Officers.*

§ 699. **Not liable for lawful Acts within their Jurisdiction.**—Highway officers who are called upon to exercise judgment and discretion in the laying out or altering of highways, enjoy, as has been seen,<sup>1</sup> the immunity which attends that kind of action. They therefore are not liable for their action in laying out a highway where they have jurisdiction and violate no law.<sup>2</sup>

§ 700. **Distinction between judicial and ministerial Acts by such Officers.**—Highway officers are frequently required in the performance of their duties to exercise powers both *quasi*-judicial and ministerial. Some attention to the distinction between these two classes has already been given,<sup>3</sup> but it is important to be still retained in mind. In ordinary cases these officers are given quite general authority over the construction and repair of highways, and are called upon (1.) to determine when and where and how work shall be done, and (2.) to execute or direct the work determined upon. Here, obviously, are duties of differing natures. The first requires the exercise of *quasi*-judicial powers, and, in accordance with the rule governing responsibility in such cases, it is well settled that, except where they invade the rights of private property,<sup>4</sup> highway officers are not liable for their erroneous judgment in determining when and where work must be done and what shall be its general nature.<sup>5</sup>

On the other hand, the execution of the work is purely ministerial, and for defaults in its performance the same liability attaches as in other cases of ministerial action.<sup>6</sup>

§ 701. **Liable for Neglect to repair where charged with Duty and provided with Funds.**—In some of the States, highway officers are charged by statute with the absolute duty of keeping the highways in repair and are provided with or authorized to procure funds for that purpose. Where the duty is thus imperatively imposed, and the officer has the necessary funds or

<sup>1</sup> See *ante*, § 639.<sup>2</sup> *Sage v. Laurain*, 19 Mich. 137.<sup>3</sup> See *ante*, § 643.<sup>4</sup> See *ante*, § 643.<sup>5</sup> *McCord v. High*, 24 Iowa 336, 345;*Smith v. Gould*, 61 Wis. 81. But see *Tearney v. Smith*, 86 Ill. 391.<sup>6</sup> *McCord v. High*, 24 Iowa, 336; *Tearney v. Smith*, 86 Ill. 391.



could procure them by using the means at his command, he is liable to a person injured by his neglect to repair.<sup>1</sup>

But lack of funds or the ability to procure them is a sufficient defense.<sup>2</sup> The officer is not bound to undertake repairs beyond the extent of the funds at his disposal,<sup>3</sup> nor, where they are insufficient to make all the repairs needed, is he liable for an error in judgment in expending them in one place when another place stood in greater need.<sup>4</sup>

### 7. *Inspectors of Provisions.*

§ 702. **Liable for Negligence.**—Inspectors of provisions and other commodities owe duties to the public and, according to some authorities, to individuals also. To individuals, it is held by these authorities, they owe the duty to bring to their undertaking reasonable skill and to perform it with reasonable care and diligence. If they fail in this respect they are, therefore, liable to the individual who employs them,<sup>5</sup> or to the one who buys the goods relying upon their inspection,<sup>6</sup> for the injury sustained.

In other cases, however, they are, with what seems to be the better reason, likened to *quasi*-judicial officers, and held not liable without proof of malice or corruption.<sup>7</sup>

The fact that the neglect of duty also subjects the officer to a penalty does not bar the private action.<sup>8</sup>

<sup>1</sup> *Hover v. Barkhoof*, 44 N. Y. 113; *Adsit v. Brady*, 4 Hill (N. Y.) 630, 40 Am. Dec. 805; *Piercy v. Averill*, 37 Hun (N. Y.) 360; *Robinson v. Chamberlain*, 84 N. Y. 389, 90 Am. Dec. 718; *Bennett v. Whitney*, 94 N. Y. 308; *Warren v. Clement*, 24 Hun (N. Y.) 472; *Babcock v. Gifford*, 29 Hun 186; *Pomfrey v. Saratoga*, 104 N. Y. 459.

*Bartlett v. Crozier*, 17 Johns. 449, 8 Am. Dec. 428, is distinguished in *Hover v. Barkhoof*, 44 N. Y. 113.

<sup>2</sup> *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Weed v. Ballston Spa*, 76 N. Y.

329; *Hines v. Lockport*, 50 N. Y. 233.

<sup>3</sup> *Boots v. Washburn*, 79 N. Y. 207.

<sup>4</sup> *Monk v. New Utrecht*, 104 N. Y. 552; *Garlinghouse v. Jacobs*, 29 N. Y. 297.

<sup>5</sup> *Hayes v. Porter*, 22 Ma. 371.

<sup>6</sup> *Nickerson v. Thompson*, 33 Ma. 433; *Tardos v. Bozant*, 1 La. Ann. 199.

<sup>7</sup> *Seaman v. Patten*, 2 Caines (N. Y.) 312; *Fath v. Koepfel*, 73 Wis. 239, 7 Am. St. Rep. 337. In this case the court do not notice the Maine or Louisiana cases above cited.

<sup>8</sup> *Hayes v. Porter*, 22 Ma. 371.

### 8. *Notaries Public.*

§ 703. *In general.*—Notaries public form a well known class of public officers, whose duties are chiefly ministerial, but in some instances judicial. They are usually appointed by the governor, and are required to give a bond for the faithful performance of their duties which are largely regulated by statute.

§ 704. *Liable for Negligence in presenting or protesting negotiable Papers.*—One of the most common duties imposed upon notaries is that of presenting and protesting negotiable instruments. Much of the undertaking of the notary, as in presenting and demanding payment or acceptance of negotiable paper and in giving notice of its dishonor, where an official protest is not required, is rather that of a private agent than of a public official. Where protest is necessary, the notary must present the bill in person,<sup>1</sup> except where an established usage warrants a presentment by deputy.<sup>2</sup>

Whether, however, he acts officially or as a private agent only, it is well settled that he must bring to his undertaking, whichever it may be, and exercise in its performance a reasonable degree of skill, care and diligence, and if, by reason of his failure to do so, his employer suffers proximate loss, the notary is liable therefor.<sup>3</sup>

A distinction is, however, to be observed in respect to the extent of the notary's undertaking, dependent upon the question whether he acts officially as notary only, or as the private agent of the holder. In the latter case, the agent entrusted with the duty of collecting negotiable paper is bound to take all the steps necessary to secure and preserve the liability thereon of all parties prior to his principal. He must, therefore, present the bill for acceptance without delay and present it for payment at maturity, and if it be not duly accepted or paid, he must cause it

<sup>1</sup> See *ante*, § 567.

<sup>2</sup> *Commercial Bank v. Varnum*, 49 N. Y. 269.

<sup>3</sup> *Hyde v. Planters' Bank*, 17 La. 560, 86 Am. Dec. 631; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y.

820, 83 Am. Rep. 618; *Allen v. Merchants' Bank*, 22 Wend. 215. 84 Am. Dec. 289; *Chapman v. McCrea*, 63 Ind. 860; *Bowling v. Arthur*, 34 Miss. 41; *Bank of Mobile v. Marston*, 7 Ala. 108.

to be immediately protested, where protest is necessary, and cause notice to be duly given of its dishonor.<sup>1</sup> With the notary, however, the case is different. When he has presented it for acceptance or payment, as the case may be, and has protested it in case of its dishonor, his duty is done and he is not, as notary, unless required by statute, obliged to go on and give notice, though he may do this as agent as well as any other person.<sup>2</sup>

Where due demand has already been made by the bank which employs him, he is not liable for negligence in not making a further demand.<sup>3</sup> He is not bound to know the place of residence of the parties on whom he is to call and, if he has used reasonable diligence, he is not liable for a mistake growing out of misinformation.<sup>4</sup> So it has been held that he is not obliged as a notary to search for such residence<sup>5</sup> nor to hunt up the parties,<sup>6</sup> nor, it has been held in one case, to demand payment of a note placed in his hands for protest.<sup>7</sup> In such matters, he acts as agent merely and not as a public officer.

§ 705. *Same Subject—What will excuse the Notary.*—In order to charge the notary, his default must be the proximate cause of the loss.<sup>8</sup> He is not liable if he acts according to instructions though they prove erroneous;<sup>9</sup> nor where the owner of the paper, advised of the notary's negligence, omits other proceedings or remedies which would have prevented loss;<sup>10</sup> nor where the owner by his own laches has deprived the notary of the right of subrogation.<sup>11</sup> So if notwithstanding the notary had done his duty the owner could not have recovered, the notary is not liable.<sup>12</sup>

§ 706. *Liability for Defaults in taking Acknowledgments.*—

<sup>1</sup> Mechem on Agency, § 511.

<sup>2</sup> Daniels Neg. Inst. II, § 960; Morgan v. Van Ingen, 2 Johns. (N.Y.) 204.

<sup>3</sup> Warren Bank v. Parker, 8 Gray (Mass.) 221.

<sup>4</sup> Bellemire v. Bank, 4 Whart. (Penn.) 105, 83 Am. Dec. 46.

<sup>5</sup> Mulholland v. Samuels, 8 Bush (Ky.) 63.

<sup>6</sup> Bennett v. Young, 18 Penn. St. 263.

<sup>7</sup> Vandewater v. Williamson, 13 Phila. 140.

<sup>8</sup> Emmerling v. Graham, 14 La. Ann. 389.

<sup>9</sup> Commercial Bank v. Varnum, 49 N. Y. 269.

<sup>10</sup> Franklin v. Smith, 21 Wend. (N. Y.) 624.

<sup>11</sup> Emmerling v. Graham, 14 La. Ann. 389.

<sup>12</sup> Reed v. Darlington, 19 Iowa 349.

The statutes of most of the States authorize notaries public to take and certify to the acknowledgment by the grantors of the execution of deeds, mortgages and other conveyances of property, and outside of the commercial centres this forms the largest portion of a notary's official duties. The form in which acknowledgments shall be taken is prescribed by statute in most instances, and in many cases technical adherence to the requirements is of vital importance to the full effectiveness of the conveyance.

In general the notary is required to certify that the parties appeared in person before him, that he knows them to be the parties named in and who executed the instrument in question, and that they acknowledged that they executed it as their free act and deed. In certain States, the acknowledgment of a married woman must appear to have been taken after an examination apart from her husband and upon certain formalities designed to evidence her free and unrestrained action.

The notary may make default in the performance of this duty chiefly in one of three classes of cases,—1. Where he knowingly and wilfully makes a false certificate. 2. Where he is deceived as to the identity of the parties, and 3. Where he omits in taking or certifying to the act of acknowledgment some fact which the statute makes indispensable. These three cases will be separately considered.

§ 707. *Same Subject*—1. *For knowingly making a false Certificate.*—There would seem to be no question that a notary who knowingly makes a false certificate of a material fact in reference to an acknowledgment, by which the person to whom he owed the duty of due performance sustains proximate injury, is liable therefor.

Thus where the notary himself forges the signatures and then certifies that the parties named appeared and acknowledged the execution, it is a plain misfeasance.<sup>1</sup> And so it would be where he knowingly certifies that a party appeared and acknowledged who did not in fact appear.<sup>2</sup> And it is likewise a misfeasance for him to sign a certificate reciting the appearance of parties without reading it.<sup>3</sup>

<sup>1</sup> *People v. Butler*, — Mich. —, 43 N. W. Rep. 273.

<sup>2</sup> *Curtiss v. Colby*, 89 Mich. 456.

<sup>3</sup> *Curtiss v. Colby*, 89 Mich. 456. In

Such an act is also clearly a breach of his official bond given to secure the faithful discharge of the duties of his office, and his sureties are therefore liable, and may be sued alone.<sup>1</sup>

§ 708. **Same Subject—2. For Mistakes in Identity of Parties.**—Upon the question of the liability for a mistake in the identity of parties, the authorities are not entirely in harmony. It is held in several cases, and it is believed to be the better rule, that the notary is bound to exercise a reasonable degree of care and caution in assuring himself that parties who present themselves before him are the identical parties that they assume to be, and that for negligence in this respect proximately causing loss the notary and his bondsmen are liable.<sup>2</sup>

this case it is said at p. 453: "This, however, is not a case where a mistake was made through inadvertence, or that due caution was exercised; it was a clear case of misfeasance. He certified that a certain person appeared before him and acknowledged the execution of the instrument, who did not in fact appear at all, and who had not even signed it. If he had read what he was certifying to he must have known that it was untrue in substance and in fact. The most charitable view to be taken of the transaction would be that he signed the certificate without reading it or knowing the contents thereof. Even this view would not relieve him, as no one has a right to sign an instrument, acting officially, without at least having read the same; to do otherwise would show such gross carelessness, and indicate such a reckless disregard for the rights of others, that his liability for damages resulting therefrom could not be made to depend upon his purpose of enabling some person to defraud third parties. In such a case his object or motive need not be inquired into in an action brought to recover the actual damages sustained in consequence of his wrongful act."

Compare with *Commonwealth v. Haines*, 97 Penn. St. 228, 39 Am. Rep. 805.

<sup>1</sup> *People v. Butler*, — Mich. —, 43 N. W. Rep. 278, citing *McCormick v. Bay City*, 23 Mich. 457; *Detroit v. Weber*, 29 Mich. 24; *Governor v. Perkins*, 2 Bibb (Ky.) 895; *Smith v. Commonwealth*, 59 Penn. St. 320; *Cummings v. Little*, 45 Me. 183.

<sup>2</sup> *State v. Meyer*, 2 Mo. App. 413; *Curtiss v. Colby*, 39 Mich. 456. In the case last cited, it is said: "A person may be deceived, no matter how carefully and cautiously he may act, in taking acknowledgments of parties who represent themselves to be the persons described in and who executed certain instruments. If they are strangers to him he may make the proper and necessary inquiries or investigation, and he may therefrom come to the conclusion that they are the proper persons and so certify, and yet be mistaken and deceived. In such a case, the question or degree of care exercised by him would become material.

If, however, the parties described in the instrument were well known to him, but did not appear before him, or if third persons well known to him not to be the proper persons

On the other hand, it is held in Pennsylvania that the notary acts judicially in taking the acknowledgment, and that he can only be held liable upon proof of "a clear and intentional dereliction of duty."<sup>1</sup>

The same result is reached in Iowa where the statute makes the officer liable who "knowingly mis-states" a fact in the certificate; mere negligence is there not enough.<sup>2</sup>

§ 709. *Same Subject—3. For defective Certificate.*—The same conflict in the authorities prevails in respect to the liability of the notary who makes a certificate which is defective in failing to show some fact which the statute imperatively requires. It is held in some cases, and it is believed with the better reason, that the notary and his bondsmen are liable for such defects where they cause proximate injury.<sup>3</sup> The notary, it is said in one case, "held himself out to the world as a person competent to perform business connected with the office. By accepting the office, he contracted with those who might employ him that he would perform it with integrity, diligence and skill. He had given a bond to indemnify those who should suffer by the unfaithful or unskillful performance of his duty."

On the other hand, it is held that the officer, in taking the acknowledgment, acts judicially, and although he negligently and unskillfully omits certain words required by the statute, so that his certificate is void, he is not liable; but only where he acts corruptly or maliciously.<sup>4</sup>

should appear, representing themselves as the proper persons, and he in either case should certify that the parties described did appear before him, and acknowledge the execution of the instrument, it would be difficult to see how his act could be considered in any light which would exempt him from liability."

As to the inquiries the officer should make, see *State v. Meyer*, 2 Mo. App. 418.

<sup>1</sup>*Commonwealth v. Haines*, 97 Penn. St. 238, 89 Am. Rep. 805, citing *Withers v. Baird*, 7 Watts (Penn.) 237, 83 Am. Dec. 754; *Jamison v. Jamison*, 8 Whart. (Penn.) 457, 31

Am. Dec. 536; *Heeter v. Glasgow*, 79 Penn. St. 79, 21 Am. Rep. 46; *Singer Mfg. Co. v. Rook*, 84 Penn. St. 442, 24 Am. Rep. 204.

See also *Henderson v. Smith*, 26 W. Va. 839, 58 Am. Rep. 189.

<sup>2</sup>*Scotten v. Fegan*, 62 Iowa 236.

<sup>3</sup>*Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714; *Curtiss v. Colby*, 89 Mich. 456, 458; *Oakland Bank v. Murfey*, 68 Cal. 455; *McAllister v. Clement*, 75 Cal. 182.

<sup>4</sup>*Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714.

<sup>5</sup>*Henderson v. Smith*, 26 W. Va. 839, 58 Am. Rep. 189.

§ 710. **Same Subject—Default of Notary must be proximate Cause of Injury.**—But here, as in other cases, in order to hold the notary and his bondsmen liable for an injury occasioned, the default complained of must have been the proximate cause of the injury sustained. Some illustrations of this rule in this connection are given in the note.<sup>1</sup>

§ 711. **Same Subject—The Measure of Damages.**—The meas-

<sup>1</sup>In *People v. Butler*, — Mich. —, 42 N. W. Rep. 273, the facts were as follows: A notary public applied to the agent of plaintiff's intestate, who was an attorney, and acting as agent in the loaning of intestate's money, for a loan for one K., his brother-in-law, on the latter's farm. The agent and notary went together and examined the farm; abstracts were furnished and a day fixed for the parties to meet. On the day set the notary took the mortgage and note, which the agent had prepared, to his house, where he claimed his brother-in-law was, and afterwards brought it back to the agent, with what purported to be the names of the brother-in-law and his wife signed thereto, and a certificate of acknowledgment by the notary. On his representation that he was authorized to receive the money, the agent paid it over to him, and received the note and mortgage, which proved to be forgeries. *Held*, that the false certificate was the proximate cause of the loss, and that the surety of the notary's bond for the faithful discharge of his official duties was liable.

But in *Oakland Bank v. Murfey*, 68 Cal. 455, it was held that the negligence of the defendant notary was not the proximate cause. The facts in brief were as follows: One Leroy went to office of defendant, introduced himself as M. B. West, and requested defendant to draw a deed of certain real estate from him to one

Henry Harmon. Defendant drew the deed, and Leroy signed and acknowledged it as M. B. West. Defendant affixed his certificate, stating that M. B. West, the person described and who had executed the deed, was personally known to him and had acknowledged the execution of the deed before him as notary. Leroy then took the deed and went to the plaintiff's bank, where he introduced himself to the president as Henry Harmon, and requested a loan upon the land. The bank's searcher examined the title and found it to be in M. B. West. LeRoy thereupon produced the deed purporting to be from M. B. West to Henry Harmon. A mortgage was then prepared and Leroy executed and acknowledged it, in the name of Henry Harmon, before the bank notary, who in his turn certified that Henry Harmon, the person described in and who had executed the deed, was personally known to him, and had acknowledged the execution of the deed before him as notary. Leroy thereupon obtained the loan. No one of the officers of the bank had ever seen Leroy until he came and introduced himself as Henry Harmon, nor was any inquiry made by any of them as to his identity. In an action to recover upon the bond of the first notary, it was held that the bank's negligence and not his was the proximate cause of the loss.

ure of damages is the amount of the loss proximately sustained by the notary's default. Thus where by his negligence in making a proper certificate a mortgage became worthless it was held that the amount of the debt and interest intended to be secured by the mortgage was the proper measure.<sup>1</sup> And the same measure was applied where he had knowingly made a false certificate.<sup>2</sup>

The notary's liability on his bond for falsely certifying to the acknowledgment of a mortgage cannot be made to depend upon whether the mortgagee has redeemed a prior mortgagee and has so reduced his damages.<sup>3</sup>

§ 712. *Same Subject—Mitigation of Damages.*—Here, as in other cases, that the party suffered no loss, or that he failed to avail himself of remedies or proceedings which would have reduced or prevented his loss, or that he had other ample security, may undoubtedly be shown in bar or in mitigation of damages.<sup>4</sup>

So that the property, upon which a mortgage inoperative because of defective acknowledgement was taken, was worthless may be shown in bar of damages.<sup>5</sup>

### 9. *Post Officers.*

§ 713. *Each is liable for his own Defaults only.*—It is well settled both in England and America, that the postmaster general, the local postmasters, and their assistants and clerks appointed and sworn as required by law, are public officers, each of whom is responsible for his own defaults and for his own defaults only, and not for those of any of the others, although selected by him, and subject to his orders,<sup>6</sup> unless he

<sup>1</sup> *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714.

<sup>2</sup> *People v. Butler*, — Mich. —, 42 N. W. Rep. 273.

<sup>3</sup> *Curtiss v. Colby*, 89 Mich. 456.

<sup>4</sup> See *Abbott v. Gillespy*, 75 Ala. 180; *State v. Cave*, 49 Mo. 129; *Norris v. State*, 23 Ark. 524. See for similar rulings in case of sheriffs, *post* § 706.

<sup>5</sup> *McAllister v. Clement*, 75 Cal. 182.

<sup>6</sup> *Keenan v. Southworth*, 110 Mass. 473, 14 Am. Rep. 618; *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Lord Le Despencer*, 2 Cowp. 754; *Dunlop v. Munroe*, 7 Cranch (U. S.) 242; *Schroyer v. Lynch*, 8 Watts (Penn.) 453; *Bishop v. Williamson*, 11 Me. 495; *Hutchins v. Brackett*, 23 N. H. 252, 53 Am. Dec. 249.



has negligently or willfully appointed or retained unfit or improper persons;<sup>1</sup> or has failed to require of them conformity to the prescribed regulations;<sup>2</sup> or has so carelessly conducted the affairs of his office as to furnish opportunity for such default;<sup>3</sup> or unless he has co-operated in, or authorized the wrong.<sup>4</sup>

Whether contractors for carrying the mail are public governmental officers withing the meaning of this rule, so as to be exempt from liability for the defaults of their subordinates, is a question upon which there is no conflict of authority, but the better opinion is that they are not.<sup>5</sup>

#### 10. *Public School and College Officers and Teachers.*

§ 714. **Distinction to be made between public and private Schools.**—A distinction is to be made, in many respects, between public and private schools. The latter are founded and carried on by private individuals at private expense, and the terms of admission, instruction and control are largely matters of express or implied contract between the parties.

But our public schools and colleges, provided by law and maintained by public funds stand upon different ground. They are public institutions, their officers are, to some extent at least, public officers and the public have rights and privileges in them which the law creates, controls and enforces.

<sup>1</sup> Wiggins v. Hathaway, 6 Barb. (N. Y.) 632.

<sup>2</sup> Bishop v. Williamson, 11 Me. 495.

In this case the postmaster was held liable for the default of an assistant whom he had not required to take the oath prescribed by law. To same effect: Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Bolan v. Williamson, 1 Brev. (S. C.) 181.

<sup>3</sup> Dunlop v. Munroe, 7 Cranch (U. S.) 342; Ford v. Parker, 4 Ohio St. 576.

<sup>4</sup> Tracy v. Cloyd, 10 W. Va. 19.

If a clerk at a postoffice receives a

letter containing money to be sent as a registered letter to X under the mistaken belief that letters can be registered to that place, and, upon discovering the mistake send it unregistered by the direction of his superior, both are liable for the value of the letter if it be lost. Fitzgerald v. Burrill, 106 Mass. 446.

<sup>5</sup> Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504; *contra*, Conwell v. Voorhees, 18 Ohio 528, 43 Am. Dec. 206; Hutchins v. Brackett, 22 N. H. 252, 58 Am. Dec. 248.

## a. Officers.

§ 715. Have Power to enact reasonable Rules and Regulations.—Officers charged by law with the general care, conduct and supervision of public schools and colleges are usually clothed by statute with express authority to enact such rules and regulations as may reasonably be necessary for that purpose, but even where this authority is not expressly conferred, the accepted doctrine is that the general power conferred by law to take charge of the educational affairs of a district or prescribed territory includes the power to make all reasonable rules and regulations for the discipline, government and management of the schools within the district or territory.<sup>1</sup>

§ 716. What this Rule includes.—This rule includes not only the power to provide rules for the discipline and government of the pupils, and the general conduct of the school, but, except where otherwise provided by law, the directors or other officers may make reasonable provisions as to what branches shall be taught and what text-books shall be used.<sup>2</sup>

§ 717. Rules need not be formal or of Record.—It is not necessary that all the rules, orders and regulations for the discipline, government and management of schools shall be a matter of record by the school board, or that every act, order or direction shall be authorized or confirmed by a formal vote. No system of rules, however carefully prepared, can provide for every emergency or meet every requirement. In consequence, much must necessarily be left to the individual members of the school boards, and to the superintendents and teachers of the several schools.<sup>3</sup>

<sup>1</sup> *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. Rep. 605; *Thompson v. Beaver*, 68 Ill. 353; *Roberts v. City of Boston*, 5 Cush. (Mass.) 198; *Sherman v. Charlestown*, 8 Cush. 160; *People v. Medical Society*, 24 Barb. (N. Y.) 570; *Spiller v. Woburn*, 13 Allen (Mass.) 127; *Hodgkins v. Rockport*, 105 Mass. 475; *State v. Burton*, 45 Wis. 150, 30 Am. Rep. 706;

*Ferriter v. Tyler*, 48 Vt. 444, 21 Am. Rep. 133; *Dritt v. Snodgrass*, 66 Mo. 236, 37 Am. Rep. 343; *State v. White*, 82 Ind. 278, 42 Am. Rep. 496.

<sup>2</sup> *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163.

<sup>3</sup> *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. Rep. 605; *Russell v. Lynnfild*, 116 Mass. 365.

§ 718. **School Officers not liable for Errors in Judgment.**—Being required by law to exercise their judgment and discretion in the management and control of the schools within their jurisdiction, it is well settled that, like other *quasi-judicial* officers,<sup>1</sup> they cannot be held liable to an individual for any injury which he may have sustained by reason of any error of judgment, however great, committed by them while acting honestly and in good faith within their jurisdiction.<sup>2</sup>

§ 719. **Are liable only when actuated by Malice.**—Such officers are, however, held liable when, and only when, in the exercise of the powers conferred upon them, they have acted wilfully or maliciously.

Thus a county school superintendent who wilfully, corruptly or maliciously refuses a license to teach to one lawfully entitled to receive it, is held liable in damages,<sup>3</sup> but, unless it be shown that they have acted maliciously or corruptly, school directors are not personally liable in damages for erroneously dismissing a teacher<sup>4</sup> or expelling or suspending a scholar.<sup>5</sup>

§ 720. **Question of Reasonableness of Regulations is for the Court.**—The question of the reasonableness of the rules and regulations established by school officers is one of law to be determined by the court, and not a question of fact to be decided

<sup>1</sup> See *ante*, § 688—689.

<sup>2</sup> *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. Rep. 605; *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 843; *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163; *Elmore v. Overton*, 104 Ind. 348, 54 Am. Rep. 343; *Danenhofer v. State*, 69 Ind. 295, 35 Am. Rep. 216; *Cooper v. McCunkin*, 4 Ind. 290; *Gardner v. State*, 4 Ind. 632; *Churchill v. Fewkes*, 18 Ill. App. 520; *Gregory v. Small*, 39 Ohio St. 346; *Morrison v. McFarland*, 51 Ind. 206; *Burton v. Fulton*, 49 Penn. St. 151.

<sup>3</sup> *Elmore v. Overton*, 104 Ind. 348, 54 Am. Rep. 343. See *ante*, § 639.

<sup>4</sup> *Burton v. Fulton*, 49 Penn. St.

151; *Gregory v. Small*, 39 Ohio St. 346; *Morrison v. McFarland*, 51 Ind. 206; *Chamberlain v. Clayton*, 56 Iowa 331, 41 Am. Rep. 101. See also *Park v. School District*, 65 Iowa 209; *Smith v. School District*, 42 Iowa 522; *Kirkpatrick v. School District*, 53 Iowa 535.

By-law that teacher may be dismissed at any time by majority of board is reasonable: *McLellan v. School Board*, 15 Mo. App. 363.

<sup>5</sup> *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 843; *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163; *Stewart v. Southard*, 17 Ohio 402, 49 Am. Dec. 463; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256.

by a jury.<sup>1</sup> In this respect they are likened to municipal ordinances.

§ 721. **What Rules and Regulations are valid—Instances.**—No inflexible rule can be laid down by which the question of what is reasonable can in every case be determined. Each case must be judged by its own circumstances, regard being had to the time, place and purpose. Emergencies often require a departure from established rules or the adoption of new ones. Subsequent events may demonstrate that what at the time appeared best and reasonable was harmful or unwise. Officers having practical experience in the conduct and management of schools are usually better qualified to judge of the wisdom or expediency of a measure than a person who has had no such experience. For these reasons courts will in doubtful cases tend rather to the support of rules and regulations adopted and enforced in good faith by officers to whom all the circumstances were present, than to overthrow them. Where, on the other hand, the unreasonableness is clear, courts will not hesitate to declare them so.

Thus the following regulations have been held valid:—A rule that pupils in a public high school shall employ a certain period in the study and practice of music and provide themselves with certain books therefore, or for unexcused disobedience be expelled;<sup>2</sup> that pupils who are absent, without satisfactory excuse, six half days in four consecutive weeks shall be suspended;<sup>3</sup> that schools shall be opened with reading from the Bible and prayer during which each pupil shall lay aside his books and remain quiet,<sup>4</sup> or shall bow his head unless his parents request that he shall be excused from doing so, and for wilful disobedience he may be expelled;<sup>5</sup> that pupils shall write compositions<sup>6</sup> and take

<sup>1</sup> *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. Rep 605; *State v. White*, 82 Ind. 278, 42 Am. Rep. 496.

<sup>2</sup> *State v. Webber*, 108 Ind. 81, 58 Am. Rep. 80.

<sup>3</sup> *King v. Jefferson City School Board*, 71 Mo. 628, 86 Am. Rep. 499. To same effect: *Burdick v. Babcock*, 81 Iowa 562, even though absent by

direction of the priest to attend religious services: *Ferriter v. Tyler*, 48 Vt. 444, 21 Am. Rep. 138.

<sup>4</sup> *McCormick v. Burt*, 95 Ill. 263, 85 Am. Rep. 163.

<sup>5</sup> *Spiller v. Woburn*, 12 Allen (Mass.) 127.

<sup>6</sup> *Guernsey v. Pitkin*, 32 Vt. 224, 76 Am. Dec. 171.

part in rhetorical exercises,<sup>1</sup> or be suspended for disobedience; that pupils guilty of persistent misconduct be expelled;<sup>2</sup> that children of immoral and licentious character be excluded;<sup>3</sup> that the doors shall be locked and no scholar admitted for fifteen minutes during the opening exercises in the morning, provided due regard is had to the weather, and the age, health and comfort of the excluded pupils;<sup>4</sup> that white and colored children shall be taught in separate apartments provided equal accommodations are provided for both.<sup>5</sup>

§ 722. **What Rules and Regulations are not reasonable—Instances.**—But, on the other hand, the following regulations have been held unreasonable: That no pupil shall, during the school term, attend a social party, and for disobedience expelling him;<sup>6</sup> that pupils who carelessly or wantonly injure or destroy the school property shall pay for the same, and for a failure to pay, whipping<sup>7</sup> or expelling<sup>8</sup> them; barring the doors in cold weather against little children who are late;<sup>9</sup> refusing admission to a public college because the applicant is a member of a Greek letter fraternity or other secret college society;<sup>10</sup> requiring every scholar on returning from recess to bring in a stick of wood for the fire.<sup>11</sup>

§ 723. **Regulations must be enforced in reasonable Manner.**—But even though the regulation be in itself reasonable it must also be enforced in a reasonable manner and under proper cir-

<sup>1</sup> *Sewell v. Board of Education*, 29 Ohio St. 89.

<sup>2</sup> *Hodgkins v. Rockport*, 105 Mass. 475; *Rulison v. Post*, 79 Ill. 567; *Murphy v. Directors*, 30 Iowa 429.

<sup>3</sup> *Sherman v. Charlestown*, 8 Cush. (Mass.) 160.

<sup>4</sup> *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709. But see *Thompson v. Beaver*, 63 Ill. 353.

<sup>5</sup> *Roberts v. Boston*, 5 Cush. (Mass.) 198; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405; *State v. Duffy*, 7 Nev. 342, 8 Am. Rep. 713; *State v. McCann*, 21 Ohio St. 198;

*County Court v. Robinson*, 27 Ark. 116.

<sup>6</sup> *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 348; *State v. Osborne*, 24 Mo. Ap. 309.

<sup>7</sup> *State v. Vanderbilt*, 116 Ind. 11, 9 Am. St. Rep. 820, 18 N. E. Rep. 266.

<sup>8</sup> *Perkins v. Directors*, 56 Iowa 476; *Holman v. Trustees*, — Mich. —, 43 N. W. Rep. 996.

<sup>9</sup> *Thompson v. Beaver*, 63 Ill. 353. See also *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709.

<sup>10</sup> *State v. White*, 82 Ind. 278, 43 Am. Rep. 496.

<sup>11</sup> *State v. Board of Education*, 63 Wis. 284, 53 Am. Rep. 282.

cumstances, with due regard to the health, comfort and welfare of pupils and teachers.<sup>1</sup>

§ 724. *Liability for not repairing.*—Members of the school board are not ordinarily liable personally for a failure to keep the school property within their jurisdiction in repair, but they may be expressly charged with that duty by statute and when so charged and provided with funds or the means to procure funds for that purpose, they will be liable to one who sustains injury from their neglect.<sup>2</sup>

§ 725. *Liability for not performing ministerial Duty—Requiring Bond from Contractors.*—School officers, like others, are liable to third persons to whom they owe the duty of performing ministerial acts required of them by law. Thus school trustees who were required by statute to require contractors for building school houses to give a bond for the payment of laborers and material men, were said to be liable to such a material man for losses which he had sustained by reason of their failure to exact the bond.<sup>3</sup>

#### b. Teachers.

§ 726. *Are to some extent public Officers.*—Teachers in public schools while standing largely *in loco parentis* to their pupils and occupying as to them rather a domestic than an official relation, yet are, in some respects at least, properly to be regarded as public officers.<sup>4</sup>

§ 727. *Are subject to Rules prescribed by Board if any.*—Rules and regulations for the government and conduct of public schools are usually prescribed by the board, trustees, committee, or other officers to whom that subject is by law entrusted; and where such rules and regulations have been prescribed, they are, if reasonable, to be the guide of the teacher who is to modify and control his action by them.<sup>5</sup>

<sup>1</sup> *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709.

<sup>2</sup> *Bassett v. Fish*, 75 N. Y. 808.

<sup>3</sup> See *Owen v. Hill*, 67 Mich. 43, 84 N. W. Rep. 649.

<sup>4</sup> See *Lander v. Seaver*, 82 Vt. 114,

76 Am. Dec. 156; *Spear v. Cummings*, 23 Pick. 224, 84 Am. Dec. 58.

<sup>5</sup> *Spear v. Cummings*, 23 Pick. (Mass.) 224, 84 Am. Dec. 58; *State v. Burton*, 45 Wis. 150, 30 Am. Rep. 706; *Dritt v. Snodgrass*, 66 Mo. 286,

§ 728. Where Board has prescribed no Rules, Teacher may do so.—But where no rules and regulations have been prescribed by the board, the teacher is authorized to make such reasonable rules as shall best promote the welfare of his school and secure order and discipline therein.<sup>1</sup>

And even where rules have been prescribed by the board, the teacher may, unless expressly prohibited, make such additional rules and requirements as special cases or sudden emergencies may render necessary.<sup>2</sup>

§ 729. Rules prescribed by Teacher must be reasonable.—But as the rules prescribed by the school board must be reasonable ones, *a fortiori* must those be reasonable which are ordained by the teacher. Instances of what rules are or are not reasonable have already been given in the preceding subdivision, and the same principles would apply to those made by teachers. But, in general, “acts done to deface or injure the school-room, to destroy the books of scholars, or the books or apparatus for instruction, or the instruments of punishment of the master; language used to other scholars to stir up disorder and insubordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school;”<sup>3</sup> using profane language, quarrelling and fighting among each other,<sup>4</sup>—these and many other similar and obvious acts the teacher may prohibit and punish.

So, in regard to the studies to be pursued, the teacher may, where no rules are prescribed by the board, exercise a reasonable discretion “as to the order of teaching them, the pupils who shall be allowed to pursue them, and the mode in which they shall be taught;”<sup>5</sup> but the teacher should not compel a scholar to pursue

27 Am. Rep. 848; *Hodgkins v. Rockport*, 105 Mass. 476; *Russell v. Lynnfield*, 116 Mass. 866; *Roberts v. Boston*, 5 Cush. (Mass.) 209.

<sup>1</sup> *Deskins v. Gose*, 85 Mo. 485, 55 Am. Rep. 887; *Patterson v. Nutter*, 78 Me. 509, 57 Am. Rep. 818; *State v. Burton*, 45 Wis. 150, 80 Am. Rep. 706; *State v. Pendergrass*, 2 Dev. & Bat. (N. C.) 365, 31 Am. Dec. 416.

<sup>2</sup> *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709; *State v. Burton*, 45 Wis. 150, 80 Am. Rep. 706.

<sup>3</sup> *ALDIS, J.*, in *Lander v. Seaver*, 33 Vt. 114, 76 Am. Dec. 156.

<sup>4</sup> *Deskins v. Gose*, 85 Mo. 485, 55 Am. Rep. 887; *Hutton v. State*, 23 Tex. App. 886, 59 Am. Rep. 776.

<sup>5</sup> *Guernsey v. Pitkin*, 33 Vt. 224, 76 Am. Dec. 171.

a study which he knows the parent has forbidden his child to take.<sup>1</sup>

§ 730. **Authority of Teacher not confined to School-room.**—The authority of the teacher is not confined to the school-room or grounds, but he may prohibit and punish all acts of his pupils which are detrimental to the good order and best interests of the school whether such acts are committed in school hours or while the pupil is on his way to or from school or after he has returned home.<sup>2</sup>

§ 731. **Right to inflict corporal Punishment.**—It is settled beyond controversy that for a violation of lawful rules the teacher may inflict upon the scholar reasonable corporal punishments.<sup>3</sup> Upon this subject the rule laid down by ALDIS, J., has been quite generally approved:—

“A school-master has the right to inflict reasonable corporal punishment. He must exercise reasonable judgment and discretion in determining when to punish and to what extent. In determining upon what is reasonable punishment, various considerations must be regarded,—the nature of the offense, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size and strength of the pupil to be punished.

Among reasonable persons, much difference prevails as to the circumstances which will justify the infliction of punishment, and the extent to which it may properly be administered. On account of this difference of opinion, and the difficulty which

<sup>1</sup> *Morrow v. Wood*, 85 Wis. 59, 17 Am. Rep. 471; *Rulison v. Post*, 79 Ill. 567.

<sup>2</sup> *Lander v. Seaver*, 82 Vt. 114, 76 Am. Dec. 156; *Hutton v. State*, 28 Tex. App. 886, 59 Am. Rep. 776; *Bolding v. State*, 28 Tex. App. 172; *Deskins v. Gose*, 85 Mo. 485, 55 Am. Rep. 887; *Burdick v. Babcock*, 81 Iowa 562; *Sherman v. Charlestown*, 8 Cush. (Mass.) 160.

<sup>3</sup> *Deskins v. Gose*, 85 Mo. 485, 55 Am. Rep. 887; *Patterson v. Nutter*, 78 Me. 509, 57 Am. Rep. 818; *Hut-*

*ton v. State*, 28 Tex. App. 886, 59 Am. Rep. 776; *Heritage v. Dodge*, 64 N.H. 297, 9 Atl. Rep. 722; *Vanvactor v. State*, 118 Ind. 276, 8 Am. St. Rep. 645; *Cooper v. McJunkin*, 4 Ind. 290; *State v. Burton*, 45 Wis. 150, 80 Am. Rep. 706; *Danenhoffer v. State*, 69 Ind. 295, 35 Am. Rep. 216; *State v. Pendergrass*, 2 Dev. & Bat. (N. C.) L. 865, 81 Am. Dec. 416; *Commonwealth v. Randall*, 4 Gray (Mass.) 36; *Lander v. Seaver*, 82 Vt. 114, 76 Am. Dec. 156.



exists in determining what is a reasonable punishment and the advantage which the master has by being on the spot to know all the circumstances, the manner, look, tone, gestures and language of the offender (which are not always easily described), and thus to form a correct opinion as to the necessity and extent of the punishment, considerable allowance should be made to the teacher by way of protecting him in the exercise of his discretion.

Especially should he have this indulgence when he appears to have acted from good motives, and not from anger or malice. Hence the teacher is not to be held liable on the ground of excess of punishment, unless the punishment is clearly excessive, and would be held so in the general judgment of reasonable men. If the punishment be thus clearly excessive, then the master should be held liable for such excess, though he acted from good motives in inflicting the punishment, and in his own judgment considered it necessary, and not excessive. But if there is any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt."<sup>1</sup>

But if the punishment were inflicted for the violation of an unreasonable rule it could not be justified.<sup>2</sup> The presumption, however, is that the teacher has not exceeded his powers and the burden of proving the contrary is upon him who alleges it.<sup>3</sup>

Within the same limits, the teacher may detain or keep the pupil in after hours as a reasonable means of punishment.<sup>4</sup>

§ 732. **Teacher not liable to Parent for refusing to receive Child as a Pupil.**—Between a schoolmaster employed by a school board and the parents of pupils, there is, it is held, no privity of contract, and hence an action will not lie against the teacher when brought by the parent for refusing to receive and instruct his child. The proper remedy is to appeal to the school board.<sup>5</sup>

<sup>1</sup>In *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156. An instruction to the jury that punishment is not excessive unless "all hands" would pronounce it so, is erroneous. The general judgment of reasonable men is the test. *Patterson v. Nutter*, 78 Me. 509, 57 Am. Rep. 818. What punishment is reasonable is a ques-

tion of fact. *Sheehan v. Sturges*, 53 Conn. 481.

<sup>2</sup>*State v. Vanderbilt*, 116 Ind. 11, 18 N. E. Rep. 266.

<sup>3</sup>*Vanvactor v. State*, 118 Ind. 276, 3 Am. St. Rep. 645.

<sup>4</sup>*Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709.

<sup>5</sup>*Spear v. Cummings*, 23 Pick. (Mass.) 224, 84 Am. Dec. 53.

11. *Recorders of Deeds.*

§ 733. Duties are chiefly owing to Individuals.—The recorder of deeds is a ministerial officer whose duties are owing chiefly to those particular individuals who have occasion to employ him, and to whom he usually looks for his compensation. He does, indeed, owe a general duty to the public at large as one part of the machinery of municipal government, but the recording of deeds and other instruments and the making of abstracts or copies of the records for each individual who requires this service forms the largest portion of his duty.

§ 734. Duty to record proper Instruments.—It is his duty to accept for record and to record every instrument presented to him for that purpose which is entitled to record in his office and which is accompanied with the payment of his lawful fees; and for a violation of this duty he is liable to the person who was entitled to his service.<sup>1</sup> That he acted in good faith or with honest intentions would not excuse his refusal or neglect to perform an absolute and certain duty.<sup>2</sup>

The performance of his duty to record an instrument entitled to record may be enforced by mandamus.<sup>3</sup>

§ 735. Must not deliver Deed before recording.—It being thus his duty to record an instrument properly entitled to be recorded, and left with him for that purpose, he will be liable if after accepting a deed for record he permits it to be taken away without recording it.<sup>4</sup>

§ 736. Liable for making an imperfect Record.—It is not only his duty to record but to record correctly, and he would undoubt-

<sup>1</sup> Cooley on Torts, 884. See Davis v. Thompson, 1 Nev. 17; Bishop v. Schneider, 46 Mo. 477, 2 Am. Rep. 538.

<sup>2</sup> See Clark v. Miller, 54 N. Y. 528; Keith v. Howard, 24 Pick. (Mass.) 292.

<sup>3</sup> Strong's Case, Kirby (Conn.) 845; *Ex parte* Goodell, 14 Johns. (N. Y.)

325; People v. Miner, 37 Barb. (N. Y.) 466.

Mandamus will not be granted at the suit of a grantee to compel the recorder to record a deed delivered to him *in escrow* and withheld from record by the grantor's order. Austin v. Register of Deeds, 41 Mich. 733.

<sup>4</sup> Welles v. Hutchinson, 2 Root (Conn.) 85.

edly be liable to one who is injured by his negligence in recording an instrument which he had accepted for that purpose.<sup>1</sup>

§ 737. **Liable for not making Index as required.**—So where the law requires the recorder to keep an index of the conveyances recorded, while the failure to index a conveyance will not destroy the effect of the instrument if properly recorded,<sup>2</sup> the recorder will be liable to one who is injured by the absence of a proper index or by using a defective index upon which he had a right to rely.<sup>3</sup>

§ 738. **Duty to allow Inspection of Records.**—It is the duty of the recorder to permit persons having a special interest, present or prospective, in particular instruments, records or chains of title recorded in his office, to inspect the same and to make abstracts or copies thereof, either in person or by attorney, upon a proper request at reasonable times and under reasonable regulations adapted to the transaction of the business of his office and the care and preservation of the records.<sup>4</sup> The performance of this duty may be enforced by mandamus,<sup>5</sup> or for a neglect or refusal to perform in a proper case, the party entitled may sustain an action.<sup>6</sup>

The right of inspection or copying does not exist, however.

<sup>1</sup> See *Sinclair v. Slawson*, 44 Mich. 123, 38 Am. Rep. 235.

<sup>2</sup> *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 538; *Schell v. Stein*, 76 Penn. St. 398, 18 Am. Rep. 416; *Chatham v. Bradford*, 50 Ga. 327, 15 Am. Rep. 693.

<sup>3</sup> *Hunter v. Windsor*, 24 Vt. 327; *Chatham v. Bradford*, 50 Ga. 327, 15 Am. Rep. 693; *Lyman v. Edgerton*, 29 Vt. 305, 70 Am. Dec. 415.

<sup>4</sup> *Randolph v. State*, 82 Ala. 527, 60 Am. Rep. 761, and note; *Boylan v. Warren*, 89 Kans. 301, 7 Am. St. Rep. 551; *State v. Rachac*, 37 Minn. 372; *Hanson v. Eichstaedt*, 69 Wis. 538; *In re McLean*, 8 The Rep. 813; *People v. Richards*, 99 N. Y. 620; *People v. Reilly*, 88 Hun (N. Y.) 429; *People v. Cornell*, 47 Barb. (N. Y.)

329; *Hawes v. White*, 66 Ma 305; *O'Hara v. King*, 53 Ill. 303.

A demand accompanied by insult or abuse is not a legal demand, but a subsequent proper demand cannot be refused because of the prior misconduct or to compel an apology. *Boyden v. Burke*, 14 How. (U. S.) 575.

<sup>5</sup> See *Randolph v. State*, 82 Ala. 527, 60 Am. Rep. 761; *Boylan v. Warren*, 89 Kans. 301, 7 Am. St. Rep. 551; *Diamond Match Co. v. Powers*, 51 Mich. 145; *State v. Williams*, 96 Mo. 13, 8 S. W. Rep. 771; *State v. Hobbitzelle*, 85 Mo. 624; and generally the cases cited in previous note.

<sup>6</sup> *Lyman v. Windsor*, 24 Vt. 305; *Lyman v. Edgerton*, 29 Vt. 305, 70 Am. Dec. 415; *Boyden v. Burke*, 14 How. (U. S.) 575; *Lum v. McCarty*, 39 N. J. L. 287.

where the person seeking it has no interest in the matter, but is prompted only by idle curiosity or speculative purposes.<sup>1</sup>

So to sustain an action for refusing inspection, it must appear that the plaintiff had such an interest as entitled him to the right, that it was refused without lawful excuse, and that the injury complained of was the proximate result of the refusal.<sup>2</sup>

§ 739. **Duty of permitting Strangers to make Abstracts of Title.**—The duty of the recorder to permit extracts and copies of the records of his office to be made being confined to those who have a special interest in some particular instrument or chain of title, it is well settled that, unless required to do so by statute as in some States,<sup>3</sup> the recorder will not be compelled to permit parties having no such special interest to make general abstracts of title for the purpose of afterwards furnishing, as a business enterprise, the information so acquired to persons who may desire it.<sup>4</sup>

<sup>1</sup> *Randolph v. State*, 83 Ala. 527, 60 Am. Rep. 761; *Brewer v. Watson*, 71 Ala. 299, 46 Am. Rep. 818; *Phelan v. State*, 76 Ala. 49; *Webber v. Townley*, 48 Mich. 584, 88 Am. Rep. 218; *Diamond Match Co. v. Powers*, 51 Mich. 145. But see *Burton v. Tuite*, — Mich. —, 44 N. W. Rep. — (not yet reported), quoted from in note to following section, where the necessity of a special interest is denied by *MORSE, J.*

See cases cited in following section.

<sup>2</sup> *Lyman v. Edgerton*, 29 Vt. 305, 70 Am. Dec. 415.

<sup>3</sup> *State v. Rachac*, 37 Minn. 372, 35 N. W. Rep. 7; *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. Rep. 30; *People v. Richards*, 99 N. Y. 620, 1 N. East. Rep. 258; *People v. Reilly*, 38 Hun (N. Y.) 429.

In *Hawes v. White*, 66 Me. 305, the court enforced the right of inspection and abstracting conferred by statute upon the county commissioners.

A statute conferring the right must be clear and it will not be extended

by construction. *Webber v. Townley*, 48 Mich. 584, 88 Am. Rep. 218.

<sup>4</sup> *Webber v. Townley*, 48 Mich. 584, 5 N. W. Rep. 971, 88 Am. Rep. 218; *Buck v. Collins*, 51 Ga. 391, 21 Am. Rep. 236; *Brewer v. Watson*, 71 Ala. 299, 46 Am. Rep. 818; *Randolph v. State*, 83 Ala. 527, 60 Am. Rep. 761; *Cormack v. Wolcott*, 37 Kans. 391, 15 Pac. Rep. 245; *Boylan v. Warren*, 39 Kans. 301, 7 Am. St. Rep. 551; *Bean v. People*, 7 Colo. 202, 2 Pac. Rep. 909; *Phelan v. State*, 76 Ala. 49.

In *Webber v. Townley*, 48 Mich. 584, 587, 88 Am. Rep. 218, 5 N. W. Rep. 971, where the relators applied for a mandamus to permit them to make a complete abstract of the records of the office, it is said: "We are of opinion that under the common law relators have not the right claimed. The right to an inspection and copy or abstract of a public record is not given indiscriminately to each and all who may, from curiosity or otherwise, desire the same, but is limited to those who have some interest therein. What this interest

The cases, generally, admit that the right of inspection at common law is not broad enough to cover this demand, and the prac-

must be we are not called upon in the present case to determine. The question has usually arisen where the right claimed was to inspect or obtain a copy of some particular document, or those relating to a given transaction or title. We have not been referred to any authority which recognizes the right of a person under the common law to a copy or abstract of the entire records of a public office in which he had no special interest, the object in view being simply private gain from the possession and use thereof.

The object sought by the relators may be considered as of such modern origin as not to have been contemplated or covered by the common law authorities relating to the inspection of public records, and the reason upon which those authorities rest would exclude relators from the right claimed. What is the right which relators seek and the result thereof? But first let us see what it is not. It is not for a public purpose. They do not seek these abstracts for purposes of publication for the use, benefit or information of the public, even if such an unlimited publication could be justified. Relators do not ask for an inspection of a record and abstract thereof relating to lands in which they claim to have any title or interest, or concerning which they desire information in contemplation of acquiring some right or interest either by purchase or otherwise. It is not as the agents or attorneys of parties seeking information because interested or likely to become so. On the contrary, the right is based upon neither a present nor prospective interest in the lands, either personally or as representative of others who have, but is

for the future private gain and emolument of relators in furnishing information therefrom to third parties for a compensation then to be paid. It is a request for the law to grant them the right to inspect the record of the title to every person's land in the county, and obtain copies or abstracts thereof to enable them hereafter, for a fee or reward, to furnish copies to such as may desire the same, whether interested or not, and irrespective of the object or motive such persons may have in view in seeking such information. In other words, relators ask the right of copying or abstracting the entire records of the county for private and speculative purposes, they having no other interest whatever therein.

Conceding to them this right under such circumstances, and the same must be accorded to all others asking it. Every resident of Jackson county may of right claim a similar privilege. Indeed, the right for such purpose, if it exists at all, can not be restricted by the residence of the party, so that the result may be more applicants than the register's office could afford room to. Farther than this to make such abstracts being thus open to all, and being a matter of right, must be granted in such a manner and such reasonable facilities must be afforded, that the right claimed and exercised will not be barren but profitable. If none but the applicants are permitted to work, the time consumed in making the abstract will, in many counties, be so long that the full fruits thereof can not be reaped during the life-time of the parties. An opportunity, therefore, should be afforded to all to have the work done within a

tical disadvantage to the public business and interests also furnishes, in most cases, a sufficient reason why the right should not be extended.

reasonable time. If, therefore, each applicant, with a corps of assistants and clerks, makes demand upon the register for facilities to prepare abstracts, may not that officer find his position a somewhat embarrassing one, and his office uncomfortably crowded, to his inconvenience and that of the public? If, however, this is a matter of right, open and common to all, and which may be enforced by *mandamus*, must not the proper authorities in such county furnish suitable room and facilities to accommodate all who may desire to exercise this right? If not, and there is to be any discrimination, who shall be favored—who shall be admitted and who excluded? How many clerks or assistants shall each applicant have the right to employ? Who shall determine what shall be considered a reasonable time within which each may complete his abstract? And, as the use of the public records can not thus be handed over to the indiscriminate use of those not interested in their future preservation, how shall the register protect them from mutilation? This he cannot do personally without neglecting his official duties, and if he must employ clerks or appoint deputies for such purposes, at whose expense shall it be, the law having made no provision for such emergencies?

These and many other embarrassing questions must arise if this right is found to exist.

It would not, however, end here. This being a right which we might term one not coupled with an interest, must apply equally to the records in each and every public office. True, the copies or abstracts from each of

the several public offices might not be so profitable to the parties making the same as would those from the register's office, but this would not go to the right to make the abstract. May then parties in no way interested, other than as are these relators, insist upon the right to inspect and copy or abstract the records of our courts—of the treasurers of our counties—of the several county officers; and, indeed, why with equal propriety may it not be extended to a like right in each of the several State offices? The right once conceded, there is no limit to it, until every public office is exhausted. The inconveniences which such a system would engraft upon public officers; the dangers both of a public and private nature, from abuses which would inevitably follow in the carrying out of such a right, are conclusive against the existence thereof. It may be said that, even admitting the right to exist, there would be no such number of persons desirous of making abstracts, and that the dangers pointed out would not therefore arise, and in corroboration thereof the past may be referred to. How far the uncertainty of the existence of such an unlimited right in the past may have kept the number of applicants within proper bounds, may have some bearing upon the question, and it may be true that the demand for abstracts of title would have some effect upon the supply offered for sale. We must bear in mind, however, that the larger and more populous the county, the greater would be the demand, and because of the larger number of volumes of records in such a county, a correspondingly increased time and

§ 740. **Duty in furnishing Copies of Record.**—It is usually made the duty of the recorder, by statute, to furnish to parties desiring them copies of particular records of his office in which they have an interest upon a demand for the same and the payment of prescribed fees. The performance of this duty may be enforced by mandamus,<sup>1</sup> or, for a refusal to perform, a remedy may be had by an action against the recorder.<sup>2</sup>

A demand accompanied by abuse or insult is not a legal demand, but a subsequent proper demand can not be refused by reason of the prior misconduct, or to compel an apology.<sup>3</sup>

force would be required for each person to perfect his abstract, and the greater danger from abuses exist. Besides, in ascertaining whether the right exists, we have a right to inquire into the evils which it would be likely to lead to, and may for this purpose follow up the natural and probable consequences likely to result therefrom, and thereby determine whether justified by the principles of the common-law decisions." Writ denied.

But in *Burton v. Tuite*, — Mich. —, 44 N. W. Rep. — (not yet reported), MORSE, J. says: "I can not agree with the opinion of this court or the reasons given for it in *Webber v. Townley*, *supra*. Nor do I anticipate that hardly any, if any, of the results imagined by the writer of that opinion would ever occur if the holding were otherwise. If any of them should happen, the law is powerful enough to remedy them, and 'sufficient unto the day is the evil thereof.'

I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that before an inspection or examination of a public record is made, the citi-

zen, who wishes to make it, must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it or intend ever to have. I also have the right to examine any title that I see fit, recorded in the public offices, for purposes of selling such information if I desire."

In this case mandamus was granted against the city treasurer of Detroit to compel him to grant to relator, who was engaged in making and selling abstracts of title, the right to inspect the records of the city tax sales. A statute, however (Acts 1889, No. 205), in terms conferred the right. CHAMPLIN, J. concurred with MORSE, J.; CAMPBELL, J. concurred in the result. The two other justices did not sit. MORSE, J. cited *Lum v. McCarty*, 89 N. J. L. 387; *Boylan v. Warren*, 39 Kans. 801; *Cole v. Rachac*, 37 Minn. 372; *German Am. L. & T. v. Richards*, 99 N. Y. 620; *Hanson v. Eichstaedt*, 69 Wis. 538, all of which are cited above.

<sup>1</sup> See *Silver v. People*, 45 Ill. 225; *Strong's Case*, Kirby (Conn.) 345; *Ex parte*, Goodell, 14 Johns. (N. Y.) 325.

<sup>2</sup> *Boyden v. Burke*, 14 How. (U. S.) 575.

<sup>3</sup> *Boyden v. Burke*, 14 How. U. S.) 575.

And not only is it the duty of the recorder to furnish copies, but it is also his duty to use reasonable care and diligence to furnish correct ones, and if, through negligence, he supplies erroneous copies he will be liable to the party requiring it.<sup>1</sup>

§ 741. **Liability for Negligence in making Searches or Abstracts of Title.**—It is a common undertaking of the recorder to make searches of the records contained in his office and to furnish certificates or abstracts of the results of such searches to those at whose request they were made. The recorder does not, unless by express contract, guarantee the correctness of his work, but he does agree that he possesses the requisite knowledge and skill and that he will exercise reasonable care and diligence in the performance of his undertaking. If he fails in this performance, whereby the person who employs him suffers proximate injury, he is liable for the damages sustained.\*

## 12. *Sheriffs, Marshals, Coroners and Constables.*

§ 742. **Duties and Liabilities are similar.**—Sheriffs, marshals, coroners and constables when considered in respect of their rights, duties and liabilities in the service of civil process, constitute the largest and one of the most important classes of ministerial officers.

Their rights, duties and liabilities in this respect are substantially similar, and they will all be here considered together, it being understood that rules laid down in reference to one apply also, unless otherwise indicated, to the others.

§ 743. **What Parties are interested.**—It will be obvious that three classes of persons are chiefly interested in the due performance of the officer's duties,—the plaintiff in the writ, the defend-

<sup>1</sup> *Smith v. Holmes*, 54 Mich. 104, 111; *Chase v. Heaney*, 70 Ill. 268; *Clark v. Marshall*, 34 Mo. 429; *Savings Bank v. Ward*, 100 U. S. 195.

\* As where he negligently omits a mortgage: *Smith v. Holmes*, 54 Mich. 104, or certifies that there are no mortgages when in fact there is one on record: *McCaraher v. Commonwealth*, 5 Watts & Serg. (Penn.) 21,

39 Am. Dec. 106; *Ziegler v. Commonwealth*, 13 Penn. St. 227; or omits an assessment which constitutes a lien: *Morange v. Mix*, 44 N. Y. 315.

See also *Chase v. Heaney*, 70 Ill. 268, applying the same rule to a professional abstractor, and *Savings Bank v. Ward*, 100 U. S. 195, where the same rule is applied to an attorney who undertakes to make a search.



ant in the writ, and strangers to the process whose rights may, in the attempted execution of the process, be unlawfully invaded by the officer. There will, therefore, be here considered the question of the duties and liabilities of the officer—

- a. To the plaintiff in the process.
- b. To the defendant in the process.
- c. To strangers to the process.

a. To the Plaintiff in the Process.

§ 744. **Duty to execute lawful Process.**—It is, in general terms, the duty of the officer to the plaintiff in the proceedings to execute with reasonable diligence according to its terms all lawful civil process to which the plaintiff is a party and which is duly delivered to him for service within his jurisdiction.<sup>1</sup>

§ 745. **Must serve irregular or voidable Process.**—The duty of the officer is ministerial, not judicial. His province is to execute the process regularly delivered to him for service and not to sit in judgment upon the regularity of the proceedings upon which it was obtained. He is protected by the law, as will be seen hereafter,<sup>2</sup> in executing according to its tenor all process, fair upon its face, which is delivered to him for service.

He will, therefore, be protected in executing, and it is his legal duty to execute process, though it be irregular, erroneous or voidable where it comes in due form from a court of competent jurisdiction, and neither his own intrinsic knowledge that there existed no cause of action,<sup>3</sup> or that the judgment, not reversed or stayed, was fraudulently obtained,<sup>4</sup> nor the fact that the judgment or proceedings were irregular,<sup>5</sup> nor any other defect or irregularity not rendering the process void, can excuse him from its service.<sup>6</sup>

<sup>1</sup> *Cole v. Parker*, 7 Iowa 167, 71 Am. Dec. 439; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418; *Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238; *Lindsay v. Armfield*, 3 Hawks (N. C.) 548, 14 Am. Dec. 608; *Fletcher v. Bradley*, 12 Vt. 22, 36 Am. Dec. 324; *Whitney v. Butterfield*, 18 Cal. 335, 78 Am. Dec. 584.

<sup>2</sup> See *post*, § 768.

<sup>3</sup> *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324.

<sup>4</sup> *Baker v. Sheehan*, 29 Minn. 235.

<sup>5</sup> *Bensel v. Lynch*, 44 N. Y. 162.

<sup>6</sup> *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324; *Stevenson v. McLean*, 5 Humph. (Tenn.) 333, 42 Am. Dec. 434; *Cody v. Quinn*, 6 Ired. (N.

"Mere formal defects in the process," it is said, "not rendering it void, even if considerable enough to cause it to be abated, quashed or set aside as irregular, on proper motion or plea by the party directly affected by it, but which, if not so moved, do not affect the legal validity of the process, can never be interposed by the officer, in whose hands it is placed for service, as a shield to protect him from the consequences of plain derelictions of duty in respect to it."<sup>1</sup>

A distinction is, however, to be observed between process which is irregular, defective or voidable only, and that which is void for want of jurisdiction or other cause. For—

§ 746. **Need not serve void Process.**—The rule that an officer is justified by his process, not void upon its face, is one of protection merely; and although the officer may execute such process, yet if it is in fact void for want of jurisdiction in the court or officer issuing it, he may refuse to execute it and no action will lie against him for such refusal.<sup>2</sup>

Hence where an execution regular on its face is issued without

C.) 191, 44 Am. Dec. 75; *Chase v. Plymouth*, 20 Vt. 469, 50 Am. Dec. 52; *McComb v. Reed*, 28 Cal. 281, 87 Am. Dec. 115; *Stoddard v. Tarbell*, 20 Vt. 331; *Martin v. Hall*, 70 Ala. 421; *Bensel v. Lynch*, 44 N. Y. 162; *Roth v. Duvall*, 1 Idaho 149; *Albee v. Ward*, 8 Mass. 79; *Kleissendorff v. Fore*, 3 B. Mon. (Ky.) 478; *Jordan v. Porterfield*, 19 Ga. 139, 63 Am. Dec. 801.

<sup>1</sup> *DAVIS, J.* in *Chase v. Plymouth*, 20 Vt. 469, 50 Am. Dec. 52.

<sup>2</sup> *Newburg v. Munshower*, 29 Ohio St. 617, 23 Am. Rep. 769; *Reid v. Stegman*, 99 N. Y. 646; *Crocker on Sheriffs*, §§ 284, 286; *Earl v. Camp*, 16 Wend. (N. Y.) 562; *Cornell v. Barnes*, 7 Hill (N. Y.) 85; *Gwynne on Sheriffs*, 573.

In *Tuttle v. Wilson*, 24 Ill. 561, approved in *Housh v. People*, 75 Ill. 491, it is said: "The rule that a ministerial officer is protected in the

execution of process, issued by a court or officer having jurisdiction of the subject-matter and of the process, if it be regular on its face and does not disclose a want of jurisdiction, is a rule of protection merely, and beyond that confers no right; it is held to be personal to the officer himself, and affords no shelter to the wrong-doer under color of whose process, if it be void, the officer is called upon to act.

Such an officer may stop in the execution of process, regular on its face, whenever he becomes satisfied there is a want of jurisdiction in the officer or court issuing it, and if sued for neglect of duty may show in his defence and want of jurisdiction. *Earl v. Camp*, 16 Wend. 562. He can, if he chooses, take the responsibility of determining the question of jurisdiction, or any other question to which the process may give rise."

a judgment to support it, the officer to whom it is directed may disregard its command without incurring any liability.<sup>1</sup>

§ 747. **Right to demand Prepayment of Fees.**—An officer whose services are to be compensated by fees paid by the person who employs him may demand that his lawful fees be paid to him before he will undertake the service, but he may waive prepayment, and if he expressly or tacitly assumes to perform the duty without demanding it, he will be deemed to have waived it, and he will be held to the same liability for faithful service as though his fees had been advanced to him.<sup>2</sup>

§ 748. **Right of Officer to demand Indemnity.**—The officer to whom a writ for the seizure of property is delivered for service is bound ordinarily not only to serve it, but, at his peril, to seize only the property of the defendant therein named and subject to such seizure. In order, however, to relieve the officer from such a hazardous liability in doubtful cases, statutes have been enacted in most of the States authorizing the officer, where there is reasonable doubt as to the ownership of the goods or their liability to seizure either to test the question by some preliminary proceeding, as by a sheriff's jury, or to demand indemnity from the person who requires their seizure.<sup>3</sup>

Whether the right to demand indemnity exists, except as conferred by statute, may not be altogether clear, but the decided tendency of the courts is to permit the officer to demand it whenever there is a reasonable doubt as to the defendant's title or the liability of the property to the writ.<sup>4</sup>

§ 749. **If no Indemnity demanded, Officer is bound to serve.**—"When a sheriff takes a writ," says Chief Justice PARKER, "with directions to serve it in a particular manner, without requiring a written indemnity, he is bound to serve it, if he may, according to the instructions; and it is not a sufficient excuse

<sup>1</sup> *Newburg v. Munshower*, 29 Ohio St. 617, 28 Am. Rep. 769.

<sup>2</sup> *Carlisle v. Soule*, 44 Vt. 265; *Alexander v. State*, 42 Ark. 41.

*Jones v. Gupton*, 65 N. C. 48.

<sup>3</sup> These statutes are collected in *Murfrees on Sheriffs*, Ch. XIII.

<sup>4</sup> *Bond v. Ward*, 7 Mass. 123, 5 Am.

Dec. 28; *Smith v. Cicotte*, 11 Mich. 383; *Spangler v. Commonwealth*, 16 Serg. & R. (Penn.) 68, 16 Am. Dec. 548.

See *Freem. Ex.*, § 275.

*Contra*, *Adair v. McDaniel*, 1 Bailey (S. C.) L. 158, 19 Am. Dec. 664.

for him that he subsequently obtained some information which led him to suppose that a service in the manner directed would be ineffectual for the interests of the plaintiff, and even expose himself to an action, if his supposition was erroneous, and a service in the manner directed would, in fact, have been legal and effectual. He is liable unless he can show that he could not lawfully have obeyed the directions. He may require an indemnity, with a surety, if that be important for his security. If he make no such request, but undertakes to serve the process, it is not sufficient for him to say that he had some information which led him to believe that it was unsafe so to serve it. To admit such an excuse would be dangerous, and the authorities are the other way.”<sup>1</sup>

§ 750. **When Promise of Indemnity will be implied.**—Where the creditor directs the service of the process in any particular manner, a promise to indemnify the officer for serving in that manner, will, it is said, be implied from the directions. “The creditor giving the instructions undertakes that they may be obeyed.”<sup>2</sup>

§ 751. **Officer liable for Loss resulting from neglecting Instructions.**—An officer who receives a writ for service with instructions as to the time or manner of its execution or as to the property or the persons to be subjected to it, is bound to observe the instructions, if he lawfully can, and is liable for a loss resulting from his neglect to do so.<sup>3</sup>

<sup>1</sup> *Ranlett v. Blodgett*, 17 N. H. 298, 43 Am. Dec. 603, citing *Ball v. Badger*, 6 N. H. 405; *Marshall v. Hosmer*, 4 Mass. 68; *Bond v. Ward*, 7 Mass. 123, 5 Am. Dec. 28.

<sup>2</sup> *Ranlett v. Blodgett*, 17 N. H. 298, 43 Am. Dec. 603; *Gower v. Emery*, 18 Me. 79.

<sup>3</sup> “He is liable unless he can show that he could not lawfully have obeyed the directions.” *Ranlett v. Blodgett*, 17 N. H. 298, 43 Am. Dec. 603; *Ball v. Badger*, 6 N. H. 405; *Smith v. Judkins*, 60 N. H. 127; *Kimball v. Davis*, 19 Me. 310; *Abbott v. Jacobs*, 49 Me. 319; *Ansonia*

*Brass Co. v. Babbitt*, 74 N. Y. 395; *Rogers v. McDearmid*, 7 N. H. 506; *Richardson v. Bartley*, 2 B. Mon. 328; *Patton v. Hamner*, 28 Ala. 618; *Poston v. Southern*, 7 B. Mon. 289; *Walworth v. Readsboro*, 24 Vt. 252; *Shryock v. Jones*, 22 Penn. St. 303.

Plaintiff in the judgment or his assignee may direct all or part thereof to be made out of property of any of the defendants where a judgment has been recovered against several defendants and execution issued against all; and the sheriff is liable if he refuses to comply with the directions. *Root v. Wagner*, 30 N. Y. 9, 86 Am.

Thus if the plaintiff informs the officer of the danger of delay and directs an immediate service, the officer will be liable for a loss resulting from his neglect to act as directed;<sup>1</sup> so if the plaintiff points out property upon which an execution may be levied and directs the levy to be made, the officer will be liable for a loss if he neglects until some one else has acquired priorities,<sup>2</sup> or the debtor has sold the property.<sup>3</sup>

The fact that he acted in good faith and with the belief that it was for the plaintiff's interest to do so, will not excuse him,<sup>4</sup>

Where, by statute, instructions are required to be in writing, the officer is not bound by any not so given.<sup>5</sup>

§ 752. **Officer bound for reasonable Skill and Diligence.**—But in the absence of instructions, the officer to whom valid civil process is delivered for service owes to the plaintiff in the writ the duty to execute the process according to its terms with reasonable skill, care and diligence, and for a violation of this duty without sufficient reason, he will be liable to the plaintiff for the damages which he has proximately sustained thereby.<sup>6</sup>

Dec. 848, citing *Walters v. Sykes*, 23 Wend. (N. Y.) 566; *Godfrey v. Gibbons*, 23 Wend. 569.

Plaintiff may direct execution to be made in whole or in part out of any one of several joint defendants. *Starry v. Johnson*, 33 Ind. 440.

Plaintiff may direct execution to be held temporarily or permanently without service. *Smith v. Erwin*, 77 N. Y. 471; *Jackson v. Anderson*, 4 Wend. 474; *Morgan v. People*, 59 Ill. 60; or that it need not be returned. *Wehle v. Connor*, 89 N. Y. 550, or he may leave it in the officer's discretion to do the best he can. *Walker v. Haskell*, 11 Mass. 177.

But an officer is not bound to follow plaintiff's instructions if they are oppressive or will produce a great sacrifice of property. *McDonald v. Neilson*, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431.

<sup>1</sup>*Tucker v. Bradley*, 15 Conn. 46; *Peirce v. Partridge*, 8 Metc. (Mass.)

44; *Smith v. Judkins*, 60 N. H. 127; *Hunter v. Phillips*, 56 Ga. 634; *Kittredge v. Bellows*, 7 N. H. 399.

<sup>2</sup>*Kittredge v. Bellows*, 7 N. H. 399. That there was a mortgage on the land upon which he was directed to levy, even though in an amount equal to the value of the land, does not excuse the officer for not levying. *Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238. Officer is not liable for not levying on property designated if he made a levy upon sufficient other property to satisfy the writ. *Id.*

<sup>3</sup>*Townsend v. Libbey*, 70 Me. 162.

<sup>4</sup>*Smith v. Judkins*, 60 N. H. 127, where the officer refrained in good faith thinking that an attachment would drive the defendant into insolvency.

<sup>5</sup>*Sanford v. Boring*, 12 Cal. 539; *Betts v. Norris*, 15 Me. 468.

<sup>6</sup>*State v. Finn*, 87 Mo. 310; *State v. Finn*, 24 Mo. App. 344; *Noble v.*

This requirement of diligence extends from the commencement of the service to its termination,—from the acceptance of the writ until its due return.

Following this duty into details, we have—

§ 753. **Liabie for Negligence in serving Process for Appearance.**—The officer is therefore bound to exercise reasonable diligence in serving process for defendant's appearance. What is reasonable, depends in this case, as in others, upon the circumstances. The officer ordinarily should serve process in the order in which it is delivered to him.<sup>1</sup> He is not obliged to neglect the business of everybody else<sup>2</sup> nor start the instant he receives the writ,<sup>3</sup> but has, under ordinary circumstances, until the return day in which to make the service.<sup>4</sup>

Desmond, 72 Cal. 880; Carter v. Duggan, 144 Mass. 82; Kreher v. Mason, 25 Mo. App. 291; Freeman v. Leonard, 99 N. O. 274; Schneider v. Sears, 18 Ore. 69; State v. Rayburn, 22 Mo. App. 808; Smith v. Judkins, 60 N. H. 127; State v. Ownby, 49 Mo. 72; Ansonia Brass & C. Co. v. Babbitt, 74 N. Y. 395; Robinson v. Brennan, 90 N. Y. 208; State v. Schar, 50 Mo. 398; Freudenstein v. McNier, 81 Ill. 208; Evans v. Thurston, 58 Iowa 122; Bonnell v. Bowman, 58 Ill. 460.

Isolated cases lay down somewhat varying rules as "due diligence," Hallett v. Lee, 3 Ala. 28; Andrews v. Keep, 38 Ala. 815; Harris v. Murfree, 54 Ala. 161; "diligence," Hunter v. Phillips, 56 Ga. 684; Wakefield v. Moore, 65 Ga. 268; Henry v. Commonwealth, 107 Penn. St. 361; "active diligence," Harwell v. Worsham, 2 Humph. (Tenn.) 524, such skill and diligence as a reasonable

man would exercise under like circumstances. Crosby v. Hungerford, 59 Iowa 712. "Ordinary skill and diligence" is the test laid down in Shearman & Redfield on Negligence, II., § 619. "The utmost expedition" was required in Lindsay v. Armfield, 8 Hawks. 548, 14 Am. Dec. 603.

<sup>1</sup> Rust v. Pritchett, 5 Harr. (Del.) 260.

<sup>2</sup> Commonwealth v. Gill, 14 B. Mon. (Ky.) 20.

<sup>3</sup> Whitney v. Butterfield, 18 Cal. 836, 78 Am. Dec. 584.

In this case the court said, per TERRY, C. J.: "The law is reasonable in this as in all other things. It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties. It sanctions no negligence, but it requires no impossibilities, and imposes no unconscionable

<sup>4</sup> While he has ordinarily until the return day, the circumstances may be such as to require immediate action. State v. Rollins, 18 Mo. 179; State v. Ferguson, 18 Mo. 167; State v. Lealand, 82 Mo. 260; Whitney v. Butter-

field, 18 Cal. 835, 78 Am. Dec. 584; Trigg v. McDonald, 2 Humph. (Tenn.) 386; Commonwealth v. Gill, 14 B. Mon. (Ky.) 20; Barnes v. Thompson, 2 Swan (Tenn.) 813.

But if he is informed of unusual circumstances which require more haste, as if the debtor is about to depart from the country or is only temporarily within the jurisdiction,<sup>1</sup> or if the statute of limitations is liable to expire, or if, for any other reason, the plaintiff should direct that it be served immediately, the officer would be bound to use a greater degree, but still the same kind of diligence,—reasonable diligence under the unusual circumstances.<sup>2</sup>

This duty requires that the officer shall exercise reasonable diligence to find the defendant, and reasonable care to make a proper and sufficient service;<sup>3</sup> but, at the same time, the officer is not bound to find the defendant at all hazards, and he is not liable if he does not find him, though within reach of his process, if he used reasonable diligence.<sup>4</sup>

§ 754. **Liable for Negligence in searching for Property.**—Where an officer receives process for the seizure of property,

exactions. When process of attachment or execution comes to the hands of the sheriff, he must obey the exigency of the writ. He must, in such cases, execute the writ with all reasonable celerity. Whenever he can make the money on execution, or secure the debt by attachment, he must do it. But he is not held to the duty of starting on the instant after receiving a writ to execute it, without regard to anything else than its instant execution. Reasonable diligence is all that is required of him in such instances. But this reasonable diligence depends upon the particular facts in connection with the duty. If, for example, a sheriff has an execution against A, and has no special instruction to execute it at once, and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligation to execute it instantaneously, as if he were so instructed and there were circumstances of urgency. So in respect to an attachment. If an

attachment were sued out on the ground of a defendant's fraud, or his being in the act of leaving the State, or removing his property, the very fact of the issuance of the attachment, or the making of the affidavit, would seem to indicate to the officer the necessity of immediate action."

<sup>1</sup> Phillips v. Ronald, 8 Bush (Ky.) 244, 96 Am. Dec. 216, where sheriff was charged for neglecting to arrest an absconding debtor on a warrant placed in his hands early in the evening with notice that debtor was at hotel in the same town and would depart before morning.

<sup>2</sup> Kittredge v. Bellows, 7 N. H. 399; Tucker v. Bradley, 15 Conn. 46; Smith v. Judkins, 60 N. H. 127; Hunter v. Phillips, 56 Ga. 634.

<sup>3</sup> The officer should go to the defendant's house and make inquiries in the neighborhood, and not return the writ *non est inventus*, relying on mere rumor: Hinman v. Borden, 10 Wend. 367, 25 Am. Dec. 568.

<sup>4</sup> Strout v. Pennell, 74 Me. 264.

either generally as in the case of an attachment or execution,<sup>1</sup> or specifically as in the case of replevin,<sup>2</sup> he is bound to use reasonable diligence to execute the writ according to its command.

It is not infrequent that the plaintiff points out property when it is not known to the officer, but if it be pointed out by another, or if the officer has knowledge of it, no matter how obtained, or if by the exercise of reasonable diligence he might have discovered it, within his bailiwick, subject to seizure, he will be liable if he neglects to levy.<sup>3</sup>

He should ordinarily retain the writ and continue his endeavors to find the property up to the time fixed for its return.<sup>4</sup>

But the mere fact that the defendant had property within the bailiwick liable to seizure is not enough to charge the officer with neglect. If he has used reasonable diligence to discover it, he will have done his duty, even if he did not find the property,<sup>5</sup>

<sup>1</sup> *State v. Finn*, 87 Mo. 310; *Fisher v. Gordon*, 8 Mo. 386; *State v. Ownby*, 49 Mo. 72; *Taylor v. Wimer*, 80 Mo. 126; *Douglass v. Baker*, 9 Mo. 41; *Bonnell v. Bowman*, 58 Ill. 460; *Whitney v. Butterfield*, 18 Cal. 385, 73 Am. Dec. 584; *Lindsay v. Armfield*, 3 Hawks 548, 14 Am. Dec. 603; *Fletcher v. Bradley*, 12 Vt. 22, 36 Am. Dec. 324; *Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238; *Watson v. Watson*, 9 Conn. 140, 28 Am. Dec. 324; *Tucker v. Bradley*, 15 Conn. 46; *Dayton v. Lynes*, 81 Conn. 578; *Elmore v. Hill*, 46 Wis. 618; *State v. Leland*, 82 Mo. 260; *Bell v. Commonwealth*, 1 J.J. Marsh (Ky.) 551; *State v. Roberts*, 12 N. J. L. 114, 21 Am. Dec. 62; *Garrett v. Hamblin*, 11 Smedes & M. (Miss.) 219, 49 Am. Dec. 53; *State v. Bondy*, 15 La. Ann. 573; *Marshall v. Simpson*, 18 La. Ann. 437; *Waite v. Delesdernier*, 15 Me. 144; *Thompson v. Morris*, 2 B. Mon. (Ky.) 86; *Commonwealth v. Lightfoot*, 7 B. Mon. 298; *McKinney v. Craig*, 4 Sneed (Tenn.) 577; *Kennedy v. Brent*, 6 Cranch (U. S.) 187; *Dunlap v. Berry*, 4 Scam. (Ill.) 827, 39 Am. Dec. 418;

*Hargrave v. Penrod*, Breese (Ill.) 401, 12 Am. Dec. 201; *Trigg v. McDonald*, 2 Humph. (Tenn.) 386; *Barnes v. Thompson*, 2 Swan (Tenn.) 313; *Finigan v. Jarvis*, 8 U. C. Q. B. 210; *Hutchins v. Ruttan*, 6 U. C. C. P. 452; *Fisher v. Gordon*, 8 Mo. 386.

Not liable for not levying on interest in land of which he did not know, and which was not of record, the defendant not being in possession: *Force v. Gardner*, 48 N. J. L. 417.

<sup>2</sup> *People v. Wiltshire*, 9 Ill. App. 374; *Wilson v. Strobach*, 59 Ala. 488.

<sup>3</sup> *State v. Ownby*, 49 Mo. 71; *Bell v. Commonwealth*, 1 J.J. Marsh (Ky.) 551; *State v. Roberts*, 7 Halst. (N. J.) 114, 21 Am. Dec. 62. If plaintiff's attorney refuses information, when asked, officer can not be charged with it: *Batte v. Chandler*, 58 Tex. 618.

<sup>4</sup> *Henry v. Commonwealth*, 107 Penn. St. 361.

<sup>5</sup> *State v. Ownby*, 49 Mo. 71; *Fisher v. Gordon*, 8 Mo. 386; *Jacobs v. McDonald*, 8 Mo. 565; *Haynes v. Tunstall*, 5 Ark. 680; *Lawton v. Erwin*, 9 Wend. (N. Y.) 233.



though where the creditor shows that such property existed, the burden is upon the officer to show that by reasonable diligence it could not have been discovered.<sup>1</sup>

§ 755. **Liable for Negligence in making an insufficient Levy.**—So the officer is liable where, through negligence, he fails to levy upon property sufficient to satisfy the debt and costs.<sup>2</sup> “In determining what is a sufficient levy for that purpose,” says WALKER, J., “he is left to exercise his own judgment, free from the restraint or control of either the plaintiff or defendant; and is accountable to the plaintiff, on the one hand, if he fails to levy on as much as a reasonable, prudent man would deem sufficient for that purpose, (if so much is to be found within his legal grasp); and, on the other, to the defendant, for an unreasonable and unnecessary levy on his property.”<sup>3</sup>

The valuation of the property by the appraisers appointed under the statute is not conclusive for or against the officer's liability.<sup>4</sup> The true standard is the fair value at the time, taking into consideration the probable extent of sacrifice to which it would be subject at a public sale.<sup>5</sup> If the property when levied upon is sufficient under this rule to satisfy the writ, the officer will not be liable though before the sale, not delayed by his fault, the property so depreciates as to be insufficient.<sup>6</sup>

If the officer is unable upon the first levy to obtain sufficient property to satisfy the writ, he should, if other property can be found, make a second levy in order to supply the deficiency.

He will not be justified in taking the debtor's estimate of the value of the property,<sup>7</sup> but he will not be liable if the levy is insufficient because of the act or direction of the plaintiff or his agent.<sup>8</sup>

<sup>1</sup> Bonnell v. Bowman, 58 Ill. 460.

<sup>2</sup> French v. Snyder, 80 Ill. 339, 83 Am. Dec. 198; Lawson v. State, 10 Ark. 28, 50 Am. Dec. 238; Commonwealth v. Lightfoot, 7 B. Mon. (Ky.) 298; Governor v. Powell, 9 Ala. 83; Griffin v. Ganaway, 8 Ala. 625; Ransom v. Halcott, 18 Barb. (N. Y.) 56; Adams v. Spangler, 17 Fed. Rep. 133; Pitcher v. King, 5 Ad. & El. (n.s.) 753.

<sup>3</sup> In Lawson v. State, 10 Ark. 28, 50 Am. Dec. 238.

<sup>4</sup> Lawson v. State, 10 Ark. 28, 50 Am. Dec. 238.

<sup>5</sup> This depreciation, says the court, in French v. Snyder, 80 Ill. 339, 83 Am. Dec. 198, the officer should constantly bear in mind.

<sup>6</sup> Governor v. Carter, 8 Hawks. (N. C.) 323, 14 Am. Dec. 588.

<sup>7</sup> Adams v. Spangler, 17 Fed. Rep. 133.

<sup>8</sup> Billingsly v. Rankin, 2 Swan (Tenn.) 82.

§ 756. **Liability for surrendering Property without Cause.**—Equivalent to an insufficient levy, and hence subjecting the officer to liability, is his inexcusable relinquishment of property lawfully seized upon the writ,<sup>1</sup> as where he gives it up because he concludes erroneously that he has no right to hold it,<sup>2</sup> or where he allows the defendant an unauthorized exemption.<sup>3</sup>

Where goods levied upon as those of the defendant are claimed by a stranger to the writ, the officer who surrenders them to the claimant must assume the burden of proving that they were not, in fact, the goods of the defendant,<sup>4</sup> but if this be proved it is a good defense,<sup>5</sup> even though he has been offered an indemnity.<sup>6</sup>

§ 757. **Liable for negligent Delay in making Levy.**—In a recent case<sup>7</sup> it said that “the result of the adjudications on the subject seems to be that on receipt of the execution, in the absence of specific instructions, the officer must proceed with reasonable celerity to seize the property of the debtor, if he knows, or by reasonable effort can ascertain, that such debtor has property in his bailiwick liable to seizure on execution. The officer must do this as soon after the process comes to his hands as the nature of the case will admit. If he fails to execute the process within an apparently reasonable time, the burden is upon him to show, by averment and proof, that his delay was not in fact

<sup>1</sup> *Schneider v. Sears*, 13 Ore. 69; *State v. Rayburn*, 23 Mo. App. 806.

As to requirements of proof, see *Wheeler v. McDill*, 51 Wis. 856.

<sup>2</sup> *Ansonia Brass and Cop. Co. v. Babbitt*, 74 N. Y. 895.

<sup>3</sup> *State v. Spencer*, 64 Mo. 355, 27 Am. Rep. 244.

<sup>4</sup> *Wadsworth v. Walliker*, 45 Iowa 395, 24 Am. Rep. 788.

<sup>5</sup> *Wadsworth v. Walliker*, 45 Iowa 395, 24 Am. Rep. 788; *Denny v. Willard*, 11 Pick. (Mass.) 519, 23 Am. Dec. 389; *Potts v. Commonwealth*, 4 J.J. Marsh. (Ky.) 202, 20 Am. Dec. 218; *Dewey v. Field*, 4 Metc. (Mass.) 388, 88 Am. Dec. 376; *Fuller v. Holden*, 4 Mass. 501; *Tyler v. Ulmer*, 13

Mass. 169; *Learned v. Bryant*, 13 Mass. 224.

<sup>6</sup> *Wadsworth v. Walliker*, 45 Iowa 395, 24 Am. Rep. 788; *Commonwealth v. Vandyke*, 57 Penn. St. 84; *Commonwealth v. Watmough*, 6 Whart. (Penn.) 117 (distinguishing *Connelly v. Walker*, 9 Wright 440); *Lummis v. Kasson*, 43 Barb. (N. Y.) 873, 876; *Dolson v. Saxton*, 11 Hun (N. Y.) 565.

*Evans v. Thurston*, 53 Iowa 122; *contra*, was based largely upon the statute of that State, and distinguished between an attachment and an execution.

<sup>7</sup> *Elmore v. Hill*, 46 Wis. 618, approved in *Elmore v. Hill*, 51 Wis. 365.

unreasonable. Failing in this, he must respond in damages to the party injured by his negligence.”<sup>1</sup>

How much delay will be tolerated depends largely upon the circumstances of each case, but under varying conditions an unexcused delay for four days,<sup>2</sup> for eight days,<sup>3</sup> for three weeks,<sup>4</sup> and for six months<sup>5</sup> has been held to be too great.

This requirement of diligence is increased where the officer is informed of special circumstances which demand immediate action or where he is specially instructed to make the levy at once.<sup>6</sup>

In such a case a delay without excuse for one day<sup>7</sup> may charge the officer, and *a fortiori* a delay for a month.<sup>8</sup>

§ 758. Liability for Neglect to levy at all.—*A fortiori* is the officer liable where, without sufficient excuse, he omits to make any levy at all.<sup>9</sup> Where after the exercise of reasonable diligence he has been unable to find property upon which to

<sup>1</sup> *Lindsay v. Armfield*, 3 Hawks (N. C.) 548, 14 Am. Dec. 603; *Hearn v. Parker*, 7 Jones (N. C.) L. 150; *Hinman v. Borden*, 10 Wend. (N. Y.) 367, 25 Am. Dec. 568; *Janvier v. Vandever*, 3 Harr. (Del.) 29; *State v. Roberts*, 12 N. J. L. 114, 21 Am. Dec. 62; *State v. Brophy*, 38 Wis. 418, were cited.

See also *Caruthers v. Sprayberry*; 26 Ga. 437; *Chapman v. Thornburgh*, 17 Cal. 87, 76 Am. Dec. 571; *Hunter v. Phillips*, 56 Ga. 634; *Tucker v. Bradley*, 15 Conn. 46; *Kittredge v. Bellows*, 7 N. H. 399; *Garrett v. Hamblin*, 11 Smedes & M. (Miss.) 219, 49 Am. Dec. 58; *Davidson v. Waldron*, 81 Ill. 120, 83 Am. Dec. 206; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418; *Farrar v. Wingate*, 4 Rich. (S. C.) L. 35, 53 Am. Dec. 709.

<sup>2</sup> *Elmore v. Hill*, 51 Wis. 365; *State v. Roberts*, 12 N. J. L. 114, 21 Am. Dec. 62.

<sup>3</sup> *Hearn v. Parker*, 7 Jones (N. C.) L. 150.

<sup>4</sup> *Lindsay v. Armfield*, 3 Hawks (N. C.) 548, 14 Am. Dec. 603.

<sup>5</sup> *French v. Kemp*, 64 Ga. 749. But where no reason for haste is made known, and no request by plaintiff for immediate action, a delay of three or four weeks without collusion or fraud is not enough to make the officer liable: *Commonwealth v. Magee*, 8 Penn. St. 240, 49 Am. Dec. 509, nor is a delay for fourteen days: *State v. Blanch*, 70 Ind. 204.

<sup>6</sup> *Hunter v. Phillips*, 56 Ga. 634; *Tucker v. Bradley*, 15 Conn. 46; *Kittredge v. Bellows*, 7 N. H. 399.

<sup>7</sup> *Chapman v. Thornburgh*, 17 Cal. 87, 76 Am. Dec. 571.

<sup>8</sup> *Hunter v. Phillips*, 56 Ga. 634.

<sup>9</sup> *Dennis v. Whetham*, L. R. 9 Q. B. 345, 8 Eng. Rep. 380; *Dunlap v. Berry*, 4 Scam. (Ill.) 327, 39 Am. Dec. 418; *Sexton v. Nevers*, 20 Pick. (Mass.) 451, 33 Am. Dec. 225; *Isham v. Eggleston*, 2 Vt. 270, 19 Am. Dec. 714; *Hodsdon v. Wilkins*, 7 Greenl. (Me.) 113, 20 Am. Dec. 347.

levy, he is, as has been seen,<sup>1</sup> not liable; but where leviable property is shown to exist, the officer has the burden of proving a sufficient reason for not levying.<sup>2</sup>

A bare suspicion that there may be difficulty in regard to the title of property pointed out to him will not justify the officer in refusing to levy;<sup>3</sup> nor that the defendant threatened an injunction which the officer thought would be granted;<sup>4</sup> nor that he was ignorant of his legal right;<sup>5</sup> nor that he supposed that he would best subserve the plaintiff's interests thereby.<sup>6</sup>

Neither is the sickness of the officer any defense. He should either have a sufficient number of deputies or should turn the writ over to another officer.<sup>7</sup>

But where the writ has been duly recalled,<sup>8</sup> or its further execution stayed,<sup>9</sup> or enjoined,<sup>10</sup> the officer is not liable for not proceeding thereafter. So that the writ was void,<sup>11</sup> (but not where it was merely voidable),<sup>12</sup> or that the property was exempt,<sup>13</sup> or that it did not belong to the debtor, will excuse the officer.<sup>14</sup>

That the property was exempt is a defense which the officer must prove.<sup>15</sup> If he has been duly indemnified he can not then, it has been held, object that the ownership of the property or its liability to the writ was in doubt,<sup>16</sup> but this decision was based largely upon a statute which required the sheriff to proceed if

<sup>1</sup> See *ante*, § 754.

<sup>2</sup> *Bonnell v. Bowman*, 58 Ill. 460; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418.

<sup>3</sup> *Marshall v. Simpson*, 18 La. Ann. 487. Nor will the mere idle assertion of third persons justify him: *Dunlap v. Berry*, 4 Scam. (Ill.) 327, 39 Am. Dec. 418; *Robertson v. Beavers*, 3 Port. (Ala.) 385.

<sup>4</sup> *Dawson v. Bank*, 30 Ga. 664.

<sup>5</sup> *Ansonia Brass and Cop. Co. v. Babbett*, 74 N. Y. 395.

<sup>6</sup> *Smith v. Judkins*, 60 N. H. 127.

<sup>7</sup> *Freudenstein v. McNier*, 81 Ill. 206; *Evans v. Thurston*, 58 Iowa 123.

<sup>8</sup> *Wetherbee v. Foster*, 5 Vt. 186.

<sup>9</sup> *Commonwealth v. Magee*, 8 Penn. St. 240, 49 Am. Dec. 509; *State v. Gilreath*, 18 S. C. 100.

<sup>10</sup> *McCall v. McRae*, 10 Ala. 313.

<sup>11</sup> *Newburg v. Munshower*, 29 Ohio St. 617, 23 Am. Rep. 769; *Hill v. Wait*, 5 Vt. 124; *Albee v. Ward*, 8 Mass. 79.

<sup>12</sup> See *ante*, § 745.

<sup>13</sup> *Terrell v. State*, 66 Ind. 570; *Bonnell v. Bowman*, 58 Ill. 460.

<sup>14</sup> *Canada v. Southwick*, 16 Pick. (Mass.) 556; *Boynton v. Willard*, 10 Pick. (Mass.) 166; *Cowart v. Dunbar*, 56 Ga. 417; *Crosby v. Hungerford*, 59 Iowa 712.

<sup>15</sup> *Bonnell v. Bowman*, 58 Ill. 460.

<sup>16</sup> *Evans v. Thurston*, 58 Iowa 123, distinguishing *Wadsworth v. Walliker*, 45 Iowa 395, 24 Am. Rep. 788; *Van Cleef v. Fleet*, 15 Johns. (N. Y.) 147.

indemnified, and in the absence of such a statute, the better rule seems to be the other way.<sup>1</sup>

§ 759. **Liability for Escapes.**—So the officer at common law is liable for the escape of a defendant lawfully arrested upon civil process whether mesne or final.<sup>2</sup> Whenever a person, once lawfully under arrest, is at large, unless by the consent of the creditor or the authority of law, it is an escape. Every liberty not authorized by law constitute an escape.<sup>3</sup>

There are, at the common law, two kinds of escapes; the one wilful or *voluntary*, as it is often called; the other, *negligent*. The escape is voluntary where it is with the knowledge or consent of the officer, and negligent where the prisoner escapes without the knowledge or consent of the officer.<sup>4</sup>

Nothing will excuse an escape at common law of a defendant lawfully arrested except the act of God or the public enemy.<sup>5</sup>

<sup>1</sup> *Lummis v. Kasson*, 43 Barb. (N. Y.) 378, 376; *Bayley v. Bates*, 8 Johns. (N. Y.) 185; *Dolson v. Saxton*, 11 Hun (N. Y.) 565; *Commonwealth v. Vandyke*, 57 Penn. St. 84; *Commonwealth v. Watmough*, 6 Whart. (Penn.) 117.

<sup>2</sup> *Blackstone Com. III. 415*; *Adams v. Turrentine*, 8 Ired. (N. C.) L. 147, 150, where Chief Justice RUFFIN discusses the question exhaustively; *Lansing v. Fleet*, 2 Johns. (N. Y.) Cas. 3, 1 Am. Dec. 142; *Russell v. Turner*, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254; *Blanding v. Rogers*, 2 Brevard (S. C.) 894, 4 Am. Dec. 595; *Duncan v. Klinefelter*, 5 Watts. (Penn.) 141, 30 Am. Dec. 295; *State v. Mulen*, 50 Ind. 598; *State v. Hamilton*, 33 Ind. 502; *Hopkinson v. Leeds*, 78 Penn. St. 396; *Crane v. Stone*, 15 Kana. 94; *Browning v. Rittenhouse*, 38 N. J. L. 379; *Farnsworth v. Tilton*, 1 D. Chip. (Vt.) 297; *Middlebury v. Haight*, 1 Vt. 423; *Crary v. Turner*, 6 Johns. (N. Y.) 51; *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220; *Pease v. Hubbard*, 87 Ill. 257; *Lantz v. Lutz*, 8

Penn. St. 405; *Faulkner v. State*, 6 Ark. 150; *Brown Co. v. Butt*, 2 Ohio 348; *Hootman v. Shriner*, 15 Ohio St. 48; *Colby v. Sampson*, 5 Mass. 310.

<sup>3</sup> *Adams v. Turrentine*, 8 Ired. (N. C.) L. 147; *Colby v. Sampson*, 5 Mass. 310; *McMichel v. Rapelye*, 4 Ala. 333; *Nall v. State*, 34 Ala. 262; *Gage v. Graffam*, 11 Mass. 183; *Bartlett v. Willis*, 8 Mass. 86; *Stevens v. Webb*, 2 Vt. 344; *Sherburn v. Beattie*, 16 N. H. 487; *Bolton v. Cummings*, 25 Conn. 410, 423; *Clap v. Cofran*, 10 Mass. 373; *Burroughs v. Lowder*, 8 Mass. 373; *Freeman v. Davis*, 7 Mass. 200; *McLellan v. Dalton*, 10 Mass. 190; *Riley v. Whittiker*, 49 N. H. 145, 3 Am. Rep. 474.

<sup>4</sup> *Blackstone Com. III. 415*; *Adams v. Turrentine*, 8 Ired. L. 147.

<sup>5</sup> *Adams v. Turrentine*, 8 Ired. L. 147; *Saxon v. Boyce*, 1 Bailey (S. C.) 69; *Cook v. Irving*, 4 Strobhart (S. C.) 204; *Smith v. Hart*, 2 Bay. (S. C.) 395; *Abbott v. Holland*, 20 Ga. 598; *Fairchild v. Case*, 24 Wend. (N. Y.) 380; *Green v. Hern*, 2 Penn. 167; *Wheeler v. Hambright*, 9 Serg. & R. (Penn.)

After a voluntary escape, on final process the officer could not retake or detain the prisoner without authority from the plaintiff; but in the case of an escape either voluntary or negligent on mesne process the officer might retake the prisoner, and if he did so before action brought, the recaption formed a defense.<sup>1</sup>

Whether before or after judgment, the common law gave an action on the case for an escape of either kind.<sup>2</sup> Afterwards by statute the action of debt was given against the officer for escapes of debtors in execution.<sup>3</sup>

In the action on the case, the measure of damages was the amount of actual loss sustained;<sup>4</sup> while in debt, for the escape of prisoners arrested on final process, the damages were the full amount of the debt and costs.<sup>5</sup>

In the United States the liability of officers for escapes is usually regulated by statutes which the practitioner should first consult. In general, however, some distinction is made in the nature of the action and the measure of damages between escapes on mesne and final process. So also is a distinction usually made between voluntary and negligent escapes. In the former case the officer is held liable for the whole amount of the debt whether the debtor be solvent or insolvent;<sup>6</sup> while in the latter case, though the whole judgment is *prima facie* the measure of the damages, the officer may show in mitigation that the debtor had no property with which he could have paid or secured the debt in whole or in part.<sup>7</sup>

396; *Slemaker v. Marriott*, 5 G. & J. (Md.) 410; *Riley v. Whittiker*, 49 N. H. 145, 6 Am. Rep. 474.

<sup>1</sup> *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 8, 1 Am. Dec. 142; *Adams v. Turrentine*, 8 Ired. L. 147; *Bonafous v. Walker*, 2 T. R. 126; *Riley v. Whittiker*, 49 N. H. 145, 6 Am. Rep. 474; *Pariente v. Plumbtree*, 2 B. & P. 35; *Alingham v. Flower*, 2 B. & P. 246; *Langdon v. Hathaway*, 1 N. H. 369; *Butler v. Washburn*, 25 N. H. 251, 258; *Clark v. Cleveland*, 6 Hill (N. Y.) 344; *Breck v. Blanchard*, 20 N. H. 333, 51 Am. Dec. 223.

<sup>2</sup> *Adams v. Turrentine*, 8 Ired. L. 147.

<sup>3</sup> 18 Ed. I, c. 11; 1 Rich. 2, c. 12. Now changed, 5 and 6 Vic. ch. 98, § 81.

<sup>4</sup> *Blanding v. Rogers*, 2 Brev. (S. C.) 394, 4 Am. Dec. 595; *Russell v. Turner*, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254; *Duncan v. Klinefelter*, 5 Watts. (Penn.) 141, 30 Am. Dec. 295.

<sup>5</sup> *Duncan v. Klinefelter*, 5 Watts. (Penn.) 141, 30 Am. Dec. 295; *Shewell v. Fell*, 8 Yeates (Penn.) 17; 4 Yeates 47.

<sup>6</sup> *State v. Hamilton*, 33 Ind. 502.

<sup>7</sup> *State v. Mullen*, 50 Ind. 598.

But it is a good defense to an action for an escape that the process was void,<sup>1</sup> or the arrest unlawful, as that the defendant was privileged from arrest.<sup>2</sup>

§ 760. **Liability for Neglect in keeping Property seized.**—Having lawfully seized property upon his writ, the officer owes a duty to the plaintiff in keeping the property until the time arrives when it may lawfully be sold and its proceeds applied upon the plaintiff's claim.

The officer is not an insurer of the safety of the property, nor is he liable, absolutely and in all events, for its safe keeping.<sup>3</sup> His duty is to exercise reasonable and ordinary care and diligence in the matter.<sup>4</sup> If he does this, he is not liable though the property be injured or destroyed;<sup>5</sup> if he does not do this, he is liable to the plaintiff for such damages as he may sustain by reason of injury to or destruction of the property thereby occasioned.<sup>6</sup>

<sup>1</sup> *Housh v. People*, 75 Ill. 487; *Albee v. Ward*, 8 Mass. 79; *Howard v. Crawford*, 15 Ga. 423; *Ray v. Hogeboom*, 11 Johns. (N. Y.) 438; *Phelps v. Barton*, 13 Wend. (N. Y.) 68; *Carpenter v. Willett*, 31 N. Y. 90.

<sup>2</sup> *Bissell v. Kip*, 5 Johns. N. Y. 89; *Scott v. Shaw*, 13 Johns. (N. Y.) 378.

<sup>3</sup> *Eastman v. Judkins*, 59 N. H. 576.

<sup>4</sup> *Cresswell v. Burt*, 61 Iowa 590; *Burns v. Lane*, 188 Mass. 350; *Eastman v. Judkins*, 59 N. H. 576; *Noble v. Desmond*, 73 Cal. 330; *Browning v. Hanford*, 5 Hill (N. Y.) 588, 40 Am. Dec. 369; *Mills v. Gilbreth*, 47 Me. 320, 74 Am. Dec. 487; *Crofut v. Brandt*, 58 N. Y. 111; *Moore v. Westervelt*, 31 N. Y. 107, 27 N. Y. 234; *Briggs v. Taylor*, 28 Vt. 180; *Dorman v. Kane*, 5 Allen (Mass.) 38; *Parrott v. Dearborn*, 104 Mass. 104; *Snell v. State*, 2 Swan (Tenn.) 344; *Bridges v. Perry*, 14 Vt. 262; *Runlett v. Bell*, 5 N. H. 435; *Richards v. Gilmore*, 11 N. H. 498; *Lovell v. Sabin*, 15 N. H. 29; *Kendall v. Morse*, 43 N. H. 553; *Jenner v. Joliffe*, 9 Johns. (N. Y.) 881; *Stewart v. Nunemaker*, 2 Ind. 47; *State v. Nelson*, 1 Ind. 522.

A greater degree of care is required in some cases. Thus in *Hartleib v. McLane*, 44 Penn. St. 510, 84 Am. Dec. 464, it is held that a sheriff is absolutely liable for the forthcoming of property levied on by him under an execution, unless he has been deprived of it by the act of God, inevitable accident or the public enemy.

See also holding more than ordinary care requisite: *Collins v. Terrall*, 2 Smedes & M. (Miss.) 386; *Richardson v. Spencer*, 6 Ohio 4; *Wheeler v. Hambright*, 9 Serg. & R. 390; *Gilmore v. Moore*, 30 Ga. 628.

The weight of authority, however, supports the text.

<sup>5</sup> Thus he is not liable for destruction of goods by accidental fire: *Browning v. Hanford*, 5 Hill (N. Y.) 588, 40 Am. Dec. 369; *Price v. Stone*, 49 Ala. 551; *Crofut v. Brandt*, 47 How. Pr. 267, 58 N. Y. 111; or by a storm: *Moore v. Westervelt*, 25 How. Pr. Ex. 281, 21 N. Y. 107, 27 N. Y. 234.

<sup>6</sup> As to liability of United States marshal for negligent keeping of a ship, see *Jones v. McGuirk*, 51 Ill. 382, 99 Am. Dec. 556.

Ordinary care in such cases has been said to be that degree of care which an owner of ordinary prudence and sagacity would exercise in preserving like property of his own.<sup>1</sup>

§ 761. **Same Subject—Delivery Bonds—Receiptors.**—The statutes of many of the States provide that a defendant, whose property has been seized upon a writ, may be permitted to retain it in his possession by executing and delivering to the officer a bond with sureties conditioned that the property shall be forthcoming when necessary to satisfy the writ. These bonds are ordinarily known as delivery or forthcoming bonds.

The officer is not an insurer of the solvency of the obligors in such a bond, but is bound to use reasonable care and diligence in accepting only such as are solvent and competent.<sup>2</sup>

It is also a common practice for the officer to release the property upon taking from the defendant or others a receipt for the property conditioned for the delivery of the property to the officer at a time specified or the payment of the claim, interest and costs. Such a receiptor is regarded as the bailee or servant of the officer, and the officer is liable for a loss occurring by the negligence, infidelity or insufficiency of the receiptor,<sup>3</sup> but not for losses for which the officer would not himself have been liable had the goods remained in his own possession.<sup>4</sup>

But the officer can not be held liable for the default of a receiptor chosen by the plaintiff himself.<sup>5</sup>

§ 762. **Liability for accepting insufficient Bonds.**—So where it is the duty of the officer to take, for the protection of the plaintiff, bonds or other securities, it is the officer's duty not only to obtain the bond, bail or other security but to use reasonable care and diligence to see that none but competent and responsible sureties are accepted, and that the securities themselves are in proper and sufficient form.<sup>6</sup>

<sup>1</sup> *Creswell v. Burt*, 61 Iowa 590.  
See also *Jones v. McGuirk*, 51 Ill. 882,  
99 Am. Dec. 556; *Noble v. Desmond*,  
72 Cal. 380.

<sup>2</sup> *People v. Robinson*, 89 Ill. 159.

<sup>3</sup> *Donham v. Wild*, 19 Pick. (Mass.)  
520, 81 Am. Dec. 161.

<sup>4</sup> *Browning v. Hanford*, 5 Hill. (N.  
Y.) 588, 40 Am. Dec. 369.

<sup>5</sup> *Donham v. Wild*, 19 Pick. (Mass.)  
520, 81 Am. Dec. 161; *Hamilton v.*  
*Dalziel*, 2 W. Bl. 952; *DeMoranda v.*  
*Dunkin*, 4 T. R. 119.

<sup>6</sup> *Noble v. Desmond*, 72 Cal. 380;  
*Carter v. Duggan*, 144 Mass. 82; *Kre-*  
*her v. Macon*, 25 Mo. App. 291; *Har-*  
*riman v. Wilkins*, 20 Me. 98.



He is not an insurer of the solvency of the sureties, unless the statute makes him so, nor is he liable, though deceived, where he exercises reasonable care,<sup>1</sup> but if he discharges the debtor or the goods without any bond at all,<sup>2</sup> or one on which the sureties' names are forged;<sup>3</sup> or if he accepts insufficient sureties without making a reasonable effort to ascertain their solvency,<sup>4</sup> he is liable. *A fortiori* is he liable where he accepts sureties who he knows are irresponsible.<sup>5</sup>

That the plaintiff sued upon the bond taken and was unable to recover is evidence of the insufficiency of the bond.<sup>6</sup>

If the surety is solvent when taken, his after occurring insolvency will not render the officer liable.<sup>7</sup>

The liability of the officer in this, as in other cases, is to the plaintiff whose writ he serves and not to the other creditors.<sup>8</sup>

§ 763. **Liability in making Sales.**—The officer also owes to the plaintiff the duty to use reasonable care and diligence in so selling the property seized as to realize from it the largest proceeds. Hence if he negligently fails to properly advertise the sale,<sup>9</sup> or fails to use reasonable diligence in procuring the best price,<sup>10</sup> he is liable to the plaintiff for the loss sustained.

His sale must be at auction,<sup>11</sup> and for cash.<sup>12</sup> If he gives credit,<sup>13</sup> or permits a purchaser to take away the property without payment,<sup>14</sup> he is liable to the plaintiff. He should demand the money of the purchaser, and, if not paid, he should then and there avoid the sale and re-sell the property, or postpone the sale, giving notice, and make a new sale.<sup>15</sup> If he receives from

<sup>1</sup> *Hindal v. Blades*, 1 Marsh. 27, 5 Taunt. 225; *Robinson v. People*, 8 Ill. App. 279.

<sup>2</sup> *Crane v. Warner*, 14 Vt. 40.

<sup>3</sup> *Marsh v. Bancroft*, 1 Metc. (Mass.) 497.

<sup>4</sup> *Scott v. Waithman*, 8 Stark. 168; *Jeffery v. Bastard*, 4 Ad. & El. 823; *Newbert v. Cunningham*, 50 Me. 281.

<sup>5</sup> *Gerrish v. Edson*, 1 N. H. 82.

<sup>6</sup> *Carter v. Duggan*, 144 Mass. 32.

<sup>7</sup> *Commonwealth v. Thompson*, 8 Dana (Ky.) 301.

<sup>8</sup> *Ford v. Perkerson*, 59 Ga. 359.

<sup>9</sup> *Freeman v. Leonard*, 99 N. C. 274;

*Sexton v. Nevers*, 20 Pick. (Mass.) 451, 32 Am. Dec. 225; *Johnson v. Reese*, 28 Ga. 353, 73 Am. Dec. 757.

<sup>10</sup> *Todd v. Hoagland*, 36 N. J. L. 352.

<sup>11</sup> *Sheehy v. Graves*, 53 Cal. 449.

<sup>12</sup> *Payne v. Cowan*, 1 J. J. Marsh. (Ky.) 12.

<sup>13</sup> *Disston v. Strauck*, 43 N. J. L. 546.

<sup>14</sup> *Disston v. Strauck*, 43 N. J. L. 546.

<sup>15</sup> *Robinson v. Brennan*, 90 N. Y. 208.

a purchaser anything instead of money, he is bound to account for it to the plaintiff.<sup>1</sup>

No damages, however, can be recovered where the sale is not held or is delayed at the direction of the plaintiff or his attorney.<sup>2</sup>

§ 764. **Liability for not making Return and for a false Return.**—It is the duty of the officer to whom a writ has been delivered for service to return the same within the time prescribed by law with a true statement endorsed thereon of what he has done by virtue of it in the execution of its command. The return should show either that the officer has fully executed it according to its command, or, if this has not been done, then it should show a sufficient excuse for not doing so.

The time, nature and essentials of a valid return of process of various kinds are quite fully regulated by statutes in the different States, which also prescribe the method of enforcing a return and the penalties and remedies for a neglect.

But, in general, under these statutes, though perhaps not at common law,<sup>3</sup> the officer is liable to the plaintiff in the writ for such damages as he may proximately sustain by reason of the officer's neglect to make any return at all.<sup>4</sup> He is also liable for making a false return.<sup>5</sup>

<sup>1</sup> Robinson v. Brennan, 90 N. Y. 208.

<sup>2</sup> State v. Yongue, 9 Rich. (S. O.) 443; State v. Boyd, 68 Ind. 428.

<sup>3</sup> Moreland v. Leigh, 1 Stark, 888, note; Commonwealth v. McCoy, 8 Watts (Penn.) 153, 84 Am. Dec. 445; Pardee v. Robertson, 6 Hill (N. Y.) 550.

<sup>4</sup> Sloan v. Case, 10 Wend (N. Y.) 370, 25 Am. Dec. 569, and note; Laffin v. Willard, 16 Pick. (Mass.) 64, 20 Am. Dec. 639; Isham v. Eggleston, 2 Vt. 270, 19 Am. Dec. 714; Johnston v. Governor, 2 Bibb (Ky.) 186, 4 Am. Dec. 694; Clark v. Foxcroft, 6 Greenl. (Me.) 296, 20 Am. Dec. 809; Fowler v. Lee, 10 Gill. & J. (Md.) 358, 32 Am. Dec. 172; Evans v. Governor, 18 Ala. 659, 54 Am. Dec.

172; White v. Wilcox, 1 Conn. 347; Burk v. Campbell, 15 Johns. (N. Y.) 456; McGregor v. Brown, 5 Pick. (Mass.) 170; Keith v. Commonwealth, 5 J. J. Marsh. (Ky.) 359; Runlett v. Bell, 5 N. H. 438; Goodnow v. Willard, 5 Metc. (Mass.) 517; Milburn v. State, 11 Mo. 188, 47 Am. Dec. 148; Norris v. State, 23 Ark. 524; Noble v. Whetstone, 45 Ala. 861; James v. Thompson, 12 La. Ann. 174; Moore v. McOllief, 16 Ohio St. 50; Fowler v. McDaniel, 6 Heisk. (Tenn.) 529; Smith v. Tooke, 20 Tex. 750; Dunphy v. Whipple, 35 Mich. 10.

<sup>5</sup> Corson v. Hunt, 14 Penn. St. 510, 53 Am. Dec. 568; Houser v. Hampton, 7 Ired. (N. C.) 338; McArthur v. Pease, 46 Barb. (N. Y.) 423; Green v. Ferguson, 14 Johns. (N. Y.) 389;

In an action for not making a return, the plaintiff need only show the issue of the writ to the officer; the latter must then show an excuse for its non-return.<sup>1</sup>

It is no excuse for not returning a writ that the defendant is insolvent,<sup>2</sup> or bankrupt,<sup>3</sup> or that the writ was irregular,<sup>4</sup> but it is a defense that the judgment was paid before the writ issued.<sup>5</sup>

Where a sheriff fails to return an execution, the debt is assumed to be lost, and the execution creditor is *prima facie* entitled to recover of him the full amount, but the sheriff may, nevertheless, show that the defendant had no property from which the debt could have been made.<sup>6</sup>

The officer can not be held liable for neglecting to return<sup>7</sup> or for a false return<sup>8</sup> where the plaintiff has suffered no injury.

§ 765. **Liability for Money received.**—It is, of course, the duty of the officer to pay over to the plaintiff, less his legal costs and fees, the proceeds realized upon the writ, and for a default he<sup>9</sup> and his sureties<sup>10</sup> are liable.

And if the officer has accepted something else than money he must account for what he has received.<sup>11</sup>

§ 766. **The Measure of Damages.**—The measure of damages to be recovered in an action against the officer is the actual amount of the loss sustained by his default. If the whole debt is lost, then it constitutes the proper measure; but if part of the debt only is lost, then that part is the measure.<sup>12</sup> The loss complained of must, as in other cases, be the proximate

Palmer v. Crane, 8 Mo. 619; Koch v. Coots, 43 Mich. 30; Raynsford v. Phelps, 48 Mich. 342, 38 Am. Rep. 189; Prosser v. Coots, 50 Mich. 262; Dennis v. Whetham, L. R. 9 Q. B. 345, 8 Eng. Rep. 380; Brasyer v. Maclean, L. R. 6 Pr. O. C. 398, 18 Eng. Rep. 222.

<sup>1</sup> State v. Schar, 50 Mo. 398.

<sup>2</sup> Atkinson v. Heer, 44 Ark. 174; Heer v. Atkinson, 40 Ark. 377; McGee v. Robins, 2 La. Ann. 411; Bassett v. Bowmar, 8 B. Mon. 325.

<sup>3</sup> Noble v. Whetstone, 45 Ala. 361; Cox v. Ross, 56 Miss. 481.

<sup>4</sup> McRae v. Colclough, 2 Ala. 74.

<sup>5</sup> Evans v. Boggs, 2 Watts & Serg. (Penn.) 229.

<sup>6</sup> Dunphy v. Whipple, 25 Mich. 10.

<sup>7</sup> State v. Case, 77 Mo. 247; Stevenson v. Judy, 49 Mo. 227. But *contra*, see Bachman v. Fenstermacher, 112 Penn. St. 331; Atkinson v. Heer, 44 Ark. 174.

<sup>8</sup> Stimson v. Farnham, L. R. 7 Q. B. 175, 1 Eng. Rep. 60.

<sup>9</sup> Norton v. Nye, 56 Me. 211.

<sup>10</sup> Nash v. Muldoon, 16 Nev. 404.

<sup>11</sup> Robinson v. Brennan, 90 N. Y. 208.

<sup>12</sup> People v. Palmer, 46 Ill. 398, 95 Am. Dec. 418; French v. Snyder, 30

result of the officer's default, and it must also have been one to which the plaintiff's own negligence or default has not contributed.<sup>1</sup>

It is, therefore, always open for the officer to show that, notwithstanding his default, the plaintiff has suffered no injury,<sup>2</sup> or that it was brought about by the plaintiff's own conduct.<sup>3</sup>

A distinction is, however, made between acts done with the intent to injure and those where the loss occurred through the mere unintentional neglect of an officer acting in good faith.

Thus, as has been seen,<sup>4</sup> an officer who has permitted a voluntary escape of a debtor held on execution, may be charged with the whole debt whether the debtor be solvent or insolvent;<sup>5</sup> and so the officer will be charged with the full amount where he willfully neglects to serve an execution with the intention of injuring the plaintiff.<sup>6</sup>

But, in other cases, the actual amount lost is the amount to be recovered. Thus in an action for not levying upon certain property, the value of the property, when less than the amount of the judgment, is the proper measure and not the full amount of the judgment.<sup>7</sup> So, as has been seen, the officer may show that the debtor was insolvent,<sup>8</sup> that goods pointed out were exempt from execution,<sup>9</sup> or that they belonged to another,<sup>10</sup> or that the debt is still collectible from the defendant.<sup>11</sup>

Ill. 339, 83 Am. Dec. 193; Mortland v. Smith, 32 Mo. 225, 82 Am. Dec. 128; Corson v. Hunt, 14 Penn. St. 510, 53 Am. Dec. 568; Arnold v. Commonwealth, 8 B. Mon. (Ky.) 111; Bondurant v. Lane, 9 Port. (Ala.) 484; Marshall v. Simpson, 18 La. Ann. 487; State v. Miller, 48 Mo. 251; Dorrance v. Commonwealth, 13 Penn. St. 180; Sherrill v. Shuford, 10 Ired. (N. C.) L. 200; Blodgett v. Brattleboro, 30 Vt. 579; Wakefield v. Moore, 65 Ga. 268; Ivy v. Colquitt, 63 Ga. 509; State v. Lowrance, 64 N. C. 483; Abbott v. Gillespy, 75 Ala. 180.

<sup>1</sup> State v. Cave, 49 Mo. 129; Norris v. State, 22 Ark. 524; Shannon v. Clark, 8 Dana (Ky.) 154; Robinson v. Harrison, 7 Humph. (Tenn.) 189; State v. Yongue, 9 Rich. (S. C.) 443.

<sup>2</sup> Abbott v. Gillespy, 75 Ala. 180; Stimson v. Farnham, L. R. 7 Q. B. 175, 1 Eng. Rep. 60.

<sup>3</sup> See cases in note 1, *supra*.

<sup>4</sup> See *ante*, § 759.

<sup>5</sup> State v. Hamilton, 83 Ind. 502.

<sup>6</sup> Hodsdon v. Wilkins, 7 Greenl. (Me.) 118, 20 Am. Dec. 847.

<sup>7</sup> Corson v. Hunt, 14 Penn. St. 510, 53 Am. Dec. 568; Dennis v. Whet- ham, L. R. 9, Q. B. 345, 8 Eng. Rep. 380; Parker v. Peabody, 56 Vt. 221; Harris v. Murfree, 54 Ala. 161.

<sup>8</sup> McNally v. Kerswell, 37 Me. 550; Wilson v. Strobach, 59 Ala. 488.

<sup>9</sup> Terrell v. State, 66 Ind. 570; Bonnell v. Bowman, 53 Ill. 460.

<sup>10</sup> Canada v. Southwick, 16 Pick. (Mass.) 556.

<sup>11</sup> Townsend v. Libbey, 70 Me. 162.

## b. To the Defendant in the Writ.

§ 767. **In general.**—The officer may also incur liability to the defendant in the writ. This liability may arise in a variety of ways, as from an arrest or seizure without process or upon void process, the arrest of a person privileged from arrest, the seizure of exempt property, and the like, all of which will be specifically considered.

But, first, it must be noticed that—

§ 768. **No Liability arises from proper Service of valid Process.**—Where process, fair upon its face, is put into the officer's hands for service, it is his duty, as has been seen,<sup>1</sup> to proceed to execute it according to its command. Out of this duty arises the necessity of protection, and the rule is well settled that for the proper service of such process the office incurs no liability, however disastrous may be the effects upon the defendant, or however unlawful may have been the proceedings which preceded it.<sup>2</sup>

A more stringent rule has been applied in Vermont, it being there held that where he refuses or neglects to levy he makes the debt his own, and cannot escape by showing that the debtor was insolvent. *Hall v. Brooks*, 8 Vt. 485, 30 Am. Dec. 485.

<sup>1</sup> See *ante*, § 744-745.

<sup>2</sup> *Nowell v. Tripp*, 61 Me. 426, 14 Am. Rep. 572; *Judkins v. Reed*, 48 Me. 386; *Caldwell v. Hawkins*, 40 Me. 526; *Ford v. Clough*, 8 Me. 342, 23 Am. Dec. 513; *Kellar v. Savage*, 20 Me. 199; *State v. McNally*, 34 Me. 210, 56 Am. Dec. 650; *Tremont v. Clark*, 33 Me. 482; *Bethel v. Mason*, 55 Me. 501; *Bird v. Perkins*, 33 Mich. 28; *Wall v. Trumbull*, 16 Mich. 228; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Chegaray v. Jenkins*, 5 N. Y. 376; *McGuinty v. Herrick*, 5 Wend. 240; *Wilcox v. Smith*, 5 Wend. 281, 21 Am. Dec. 212; *Alexander v. Hoyt*, 7 Wend. 89;

*Beach v. Furman*, 9 Johns. (N. Y.) 238; *Coon v. Congden*, 12 Wend. 496; *Bennett v. Burch*, 1 Denio (N. Y.) 141; *Webber v. Gay*, 24 Wend. 485; *Abbott v. Yost*, 2 Denio 86; *Dunlap v. Hunting*, 2 Denio 643, 43 Am. Dec. 763; *Cornell v. Barnes*, 7 Hill (N. Y.) 35; *People v. Warren*, 5 Hill 440; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Turner v. Franklin*, 29 Mo. 285; *Glasgow v. Rowse*, 43 Mo. 479; *St. Louis &c., Assn. v. Lightner*, 47 Mo. 393; *State v. Dulle*, 48 Mo. 282; *Walden v. Dudley*, 49 Mo. 419; *Ranney v. Bader*, 67 Mo. 476; *Holden v. Eaton*, 8 Pick. (Mass.) 436; *Colman v. Anderson*, 10 Mass. 105; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Upton v. Holden*, 5 Metc. (Mass.) 860; *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Aldrich v. Aldrich*, 8 Metc. 102; *Hays v. Drake*, 6 Gray (Mass.) 387; *Howard v. Proctor*, 7 Gray 128; *Williamstown v.*

The process which will afford the officer this protection, as being fair upon its face, has been defined by Judge COOLEY as that "which proceeds from a court, magistrate or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority."<sup>1</sup>

§ 769. **Same Subject—What is meant by Process.**—"The word process," continues Judge COOLEY,<sup>2</sup> "is made use of in this rule in a very comprehensive sense, and will include any writ, warrant, order or other authority which purports to empower a ministerial officer to arrest the person, or to seize or enter upon the property of an individual, or to do any act in respect to such person or property, which, if not justified, would constitute a trespass.<sup>3</sup> Thus, a *capias ad respondendum*, or any warrant of arrest, is process;<sup>4</sup> so is a writ of possession,<sup>5</sup> (or a writ of right);<sup>6</sup> so is any execution which authorizes a levy upon property;<sup>7</sup> and

Willis, 15 Gray 427; Cheever v. Merritt, 5 Allen (Mass.) 583; Underwood v. Robinson, 106 Mass. 296; Brainerd v. Head, 15 La. Ann. 489; Blanchard v. Goss, 2 N. H. 491; Henry v. Sargent, 13 N. H. 321, 40 Am. Dec. 146; State v. Weed, 21 N. H. 262, 53 Am. Dec. 188; Rice v. Wadsworth, 27 N. H. 104; Keniston v. Little, 30 N. H. 318, 64 Am. Dec. 297; Kelley v. Noyes, 43 N. H. 209; Moore v. Allegheny City, 18 Penn. St. 55; Billings v. Russell, 23 Penn. St. 189, 63 Am. Dec. 330; Cunningham v. Mitchell, 67 Penn. St. 78; Shaw v. Dennis, 5 Gilm. (Ill.) 405; Hill v. Figley, 25 Ill. 156; Allen v. Scott, 18 Ill. 80; Loomis v. Spencer, 1 Ohio St. 153; Thames Manuf. Co. v. Lathrop, 7 Conn. 550; Watson v. Watson, 9 Conn. 140, 23 Am. Dec. 324; Neth v. Crofut, 30 Conn. 580; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Prince v. Thomas, 11 Conn. 472; McLean v. Cook, 23 Wis. 364; Noland v. Busby, 28 Ind. 154; LeRoy v. East Saginaw C. Ry. Co., 18 Mich.

333, 100 Am. Dec. 162; Lott v. Hubbard, 44 Ala. 598; State v. Lutz, 65 N. C. 503; Gore v. Mastin, 66 N. C. 371; Erskine v. Hohnbach, 14 Wall. (U. S.) 618; Bailey v. Railroad Co. 23 Wall. 604; Byles v. Genung, 52 Mich. 504.

<sup>1</sup> Cooley on Torts, 460.

<sup>2</sup> Cooley on Torts, 460.

<sup>3</sup> Citing McGuinty v. Herrick, 5 Wend. (N. Y.) 240; Loomis v. Spencer, 1 Ohio St. 153.

<sup>4</sup> Citing Parsons v. Lloyd, 3 Will. 341; Neth v. Crofut, 30 Conn. 580; Brother v. Cannon, 2 Ill. 200; Brainerd v. Head, 15 La. Ann. 489; State v. McNally, 34 Me. 210, 56 Am. Dec. 650; State v. Weed, 21 N. H. 262, 53 Am. Dec. 188; Warner v. Shed, 10 Johns. (N. Y.) 188; Underwood v. Robinson, 106 Mass. 296.

<sup>5</sup> Citing Lombard v. Atwater, 43 Iowa 599.

<sup>6</sup> Citing Colman v. Anderson, 10 Mass. 105.

<sup>7</sup> Citing Thames Manuf. Co. v. Lathrop, 7 Conn. 550; Ives v. Lucas,

so is any authority which is issued to a collector of taxes and which purports to empower him to collect the tax by distress of goods.<sup>1</sup> These are only illustrations of a class too numerous to be specified in detail."

§ 770. **Liability for illegal Arrest.**—But where the officer arrests a person without a warrant where a warrant is required,<sup>2</sup> or upon a warrant not fair upon its face as already defined,<sup>3</sup> or where, through mistake or otherwise, he arrests one person, without his fault, upon a warrant issued against another;<sup>4</sup> or arrests the right person, by the wrong name, unless it be shown that he was known as well by one as by the other;<sup>5</sup> or where he makes the arrest in a place beyond his jurisdiction;<sup>6</sup> or where he takes the body of a debtor on execution without searching for goods;<sup>7</sup> in these, and other like cases, the officer's character or writ affords him no protection and he is liable to the party injured.

The officer is bound to know the law in respect to these matters, and must keep within it at his peril.<sup>8</sup>

<sup>1</sup> C. & P. 7; *Hill v. Figley*, 25 Ill. 156; *Gott v. Mitchell*, 7 Blackf. (Ind.) 270; *Watkins v. Wallace*, 19 Mich. 57.

<sup>2</sup> Citing *Erskine v. Hohnbach*, 14 Wall. (U. S.) 613; *Shaw v. Dennis*, 10 Ill. 405; *Noland v. Busby*, 82 Ind. 154; *Kellar v. Savage*, 20 Me. 199; *Caldwell v. Hawkins*, 40 Me. 526; *Nowell v. Tripp*, 61 Me. 436, 14 Am. Rep. 572; *Clark v. Axford*, 5 Mich. 182.

<sup>3</sup> *Malcomson v. Scott*, 56 Mich. 459, as where the officer acts upon a letter or telegram from one who purports to be an officer in another State; *Bright v. Patton*, 5 Mack. (D. C.) 534, 60 Am. Rep. 896; *Bath v. Metcalf*, 145 Mass. 274, 1 Am. St. Rep. 455: cases where the arrest was made upon suspicion; *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 890; *State v. Parker*, 75 N. C. 249, 22 Am. Rep. 669: cases where the officer after the arrest failed to take the defendant before the court.

<sup>4</sup> *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Mitchell v. Foster*, 12 A. & E. 472; *Commonwealth v. Crotty*, 10 Allen (Mass.) 403, 87 Am. Dec. 669; *Kilbourn v. Thompson*, 103 U. S. 168.

<sup>5</sup> *Dunston v. Paterson*, 2 C. B. (N. S.) 495; *Formwalt v. Hylton*, 66 Tex. 288; *Hays v. Creary*, 60 Tex. 445.

<sup>6</sup> *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 456, 2 C. 1 Wend. 126; *Mead v. Haws*, 7 Cow. (N. Y.) 832; *McMahan v. Green*, 84 Vt. 69, 80 Am. Dec. 665; *Shadgett v. Clipson*, 8 East 328; *Hoye v. Rush*, 1 Man. & G. 784; *Kelly v. Lawrence*, 8 H. & C. 1; *Johnston v. Riley*, 13 Ga. 97.

<sup>7</sup> *People v. Burt*, 51 Mich. 199.

<sup>8</sup> *Barhydt v. Valk*, 12 Wend. (N. Y.) 145; 27 Am. Dec. 124, but plaintiff must show that he had property clearly subject to execution and that he disclosed the fact to the officer, who nevertheless refused to take it.

<sup>9</sup> *Malcomson v. Scott*, 56 Mich. 459.

A warrant, though fair upon its face, issued under an unconstitutional statute affords the officer no protection.<sup>1</sup>

The arrest, however, of a person privileged from arrest does not, as has been seen, render the officer liable.<sup>2</sup>

§ 771. **Liability for refusing Bail or other Abuses.**—So though the process for the arrest of the defendant is valid, yet the officer may render himself liable to the defendant for abuses of his process, as where the officer refuses proper bail,<sup>3</sup> or uses excessive force or subjects the defendant to unwarrantable insults or indignities, or treats him with cruelty, denies him proper food, or otherwise subjects him to oppression or undue hardship,<sup>4</sup> or uses the process to extort money or other things from the defendant.<sup>5</sup>

§ 772. **Liability for Levy under void, paid, expired or superseded Process.**—So where the officer makes a levy upon the defendant's property under a writ which is void upon its face,<sup>6</sup> or if he proceeds with the execution of a writ after he has received knowledge that it has been stayed, superseded or enjoined,<sup>7</sup> or after the time limited for its service has expired,<sup>8</sup> his process will afford him no justification, and he will be liable to the defendant for the injury he inflicts.

Until he receives notice of the supersedeas of his writ he is bound to proceed.<sup>9</sup> And he is not liable for proceeding with an execution, though the judgment has been paid since its issue of which fact the debtor informs him, if the plaintiff has not directed him to forbear.<sup>10</sup> Neither is he liable for serving an exe-

<sup>1</sup> *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Ely v. Thompson*, 8 A. K. Marsh. (Ky.) 70.

<sup>2</sup> See *ante*, § 648 n. 3.

<sup>3</sup> *Berrier v. Moorhead*, 22 Neb. 687, 36 N. W. Rep. 118.

<sup>4</sup> *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95; *Baldwin v. Weed*, 17 Wend. (N. Y.) 224; *Page v. Cushing*, 38 Me. 523.

<sup>5</sup> *Holley v. Mix*, 8 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Baldwin v. Weed*, 17 Wend. (N. Y.) 224.

<sup>6</sup> *Cable v. Cooper*, 15 Johns. (N. Y.) 152.

<sup>7</sup> *Hopkinson v. Sears*, 14 Vt. 494, 39 Am. Dec. 236; *O'Donnell v. Mullin*, 27 Penn. St. 199, 67 Am. Dec. 458; *Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 189.

<sup>8</sup> *Vall v. Lewis*, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300; *Stoyel v. Lawrence*, 8 Day (Conn.) 1.

<sup>9</sup> *Johnson v. Fox*, 51 Ga. 270; *Bryan v. Hubbs*, 69 N. C. 428.

<sup>10</sup> *Twitchell v. Shaw*, 10 Cush. (Mass.) 46, 57 Am. Dec. 80; *Wilmarth v. Burt*, 7 Metc. (Mass.) 257; *Mason v. Vance*, 1 Sneed (Tenn.) 178, 60 Am. Dec. 144.



ention, fair on its face, issued upon a judgment previously paid.<sup>1</sup>

§ 773. **Liability for excessive Levy.**—So the officer is liable to the defendant in the writ if he makes an excessive levy.<sup>2</sup> What rules govern the question of an excess in levying have already been considered.<sup>3</sup>

§ 774. **Liability for disregarding Exemptions.**—The officer is also liable to the defendant where he disregards, ignores or denies the exemptions to which the defendant is by law entitled.<sup>4</sup> Such an act, in the case of personality, constitutes a conversion and, where he knows of the exemption, or is bound by law to ascertain and set it off, renders the officer liable as a trespasser from the beginning.<sup>5</sup>

The measure of damages is, ordinarily, the value of the property of which the party has been wrongfully deprived.<sup>6</sup> These damages may, in most of the States, be recovered in an action

<sup>1</sup> *Mason v. Vance*, 1 Sneed (Tenn.) 178, 60 Am. Dec. 144; *Luddington v. Peck*, 2 Conn. 700; *Lewis v. Palmer*, 6 Wend. (N. Y.) 867.

<sup>2</sup> *Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 288; *Williamson v. Dow*, 32 Me. 559; *Handy v. Clippert*, 50 Mich. 355; *Cornelius v. Burford*, 28 Tex. 203, 91 Am. Dec. 309.

In an action against a sheriff for an excessive levy made by one of his deputies, COOLEY, J., said: "It cannot be tolerated that such a seizure shall go unrebuked. The officer is or should be a minister of justice, not of oppression; and he should execute every writ put into his hands in such a manner as to do as little mischief to the debtor as possible." *Handy v. Clippert*, 50 Mich. 355.

<sup>3</sup> See *ante*, § 755.

<sup>4</sup> *McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. Rep. 589; *Van Dresar v. King*, 34 Penn. St. 201, 75 Am. Dec. 448; *Dow v. Smith*, 7 Vt. 465, 29

Am. Dec. 303; *Hall v. Penney*, 11 Wend. (N. Y.) 44, 25 Am. Dec. 601; *State v. Moore*, 19 Mo. 369, 61 Am. Dec. 563; *Stilson v. Gibbs*, 53 Mich. 280; *Spencer v. Brighton*, 49 Me. 326; *Mark's Appeal*, 34 Penn. St. 36, 75 Am. Dec. 681; *Bonnel v. Dunn*, 28 N. J. L. 153; *Cornelia v. Ellis*, 11 Ill. 585; *Freeman v. Smith*, 30 Penn. St. 264; *Stephens v. Lawson*, 7 Blackf. (Ind.) 275; *Atkinson v. Gatcher*, 23 Ark. 101; *Perry v. Lewis*, 49 Miss. 448; *Handy v. Clippert*, 50 Mich. 355; *Scott v. Kenan*, 94 N. C. 296; *McGuire v. Galligan*, 57 Mich. 33.

<sup>5</sup> *State v. Johnson*, 12 Ala. 840, 46 Am. Dec. 283.

*McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. Rep. 589; *Wilson v. Ellis*, 28 Penn. St. 238. See *Bonnel v. Dunn*, 29 N. J. L. 435; *McGee v. Anderson*, 1 B. Mon. (Ky.) 187, 36 Am. Dec. 570; *State v. Morgan*, 8 Ired. (N. C.) L. 186, 38 Am. Dec. 714.

<sup>6</sup> *Stilson v. Gibbs*, 53 Mich. 280.

of trespass, case or trover, or their equivalent actions under the reformed procedure.<sup>1</sup>

The specific articles may, likewise, in most of the States, be recovered by the debtor in an action of replevin.<sup>2</sup>

<sup>1</sup> *Van Dresser v. King*, 84 Penn. St. 201, 75 Am. Dec. 643, where it was held that case would lie as well as trespass. In an exhaustive note to this case it is said: "At common law, an officer who disregards a debtor's exemption right properly perfected, and sells the property without allowing the debtor the benefits of the exemption statute, is a trespasser, and is liable to the debtor in an action of trespass. *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202; *Bonnell v. Dunn*, 28 N. J. L. 153; *Cornelia v. Ellis*, 11 Ill. 585; *Pace v. Vaughan*, 6 Ill. 80; *Wymond v. Amsbury*, 2 Col. 213; *Wilson v. Ellis*, 28 Penn. St. 288; *Freeman v. Smith*, 80 Penn. St. 264; *Stephens v. Lawson*, 7 Blackf. (Ind.) 275; *Atkinson v. Gatcher*, 28 Ark. 101; *Hall v. Penney*, 11 Wend. 44, 25 Am. Dec. 601; see *Davis v. Bryan*, 7 Yerg. (Tenn.) 88; *Hutchinson v. Campbell*, 25 Penn. St. 273; *Bean v. Hubbard*, 4 Cush. (Mass.) 85; *Connah v. Hale*, 23 Wend. 466; *Perry v. Lewis*, 49 Miss. 443. In Vermont it has been held that case will not lie, but that trespass is the proper form of action. The decision was based on usage, trespass having been the form always used in that state; *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202. The principal case sufficiently demonstrates on principle that trespass on the case will lie. In *Spencer v. Brighton*, 49 Me. 326, the action was case; and in Mississippi, the statute makes the sheriff liable to an action either of trespass or case; *Perry v. Lewis*, 49 Miss. 443. In Tennessee the action is brought in the form of trover; *McCoy v. Dail*, 6 Baxt. 137;

*Pollard v. Thomason*, 5 Humph. 56; *Wolfenbarger v. Standifer*, 3 Sneed. 661. In *Williams v. Miller*, 16 Conn. 144, the action was trespass with a count in trover. In States where the common-law forms of action are not retained, the action will be an ordinary action for damages. *Spencer v. Long*, 39 Cal. 700; *Fuller v. Sparks*, 39 Tex. 136. In Pennsylvania, where the statute does not exempt specific property, but where, on demand, it is the duty of the officer to allow an exemption of a specified value, the debtor has no right to the proceeds of the sale, his sole remedy being an action against the officer for the trespass; *Mark's Appeal*, 34 Penn. St. 36, 75 Am. Dec. 631; *Hammer v. Freese*, 19 Penn. St. 255; *Hatch v. Bartle*, 45 Penn. St. 166; *Bonsall v. Comly*, 44 Penn. St. 442."

In Michigan the action is usually case, *Stilson v. Gibbs*, 53 Mich. 280, or trover.

<sup>2</sup> *Goozen v. Phillips*, 49 Mich. 7; *Hutchinson v. Roe*, 44 Mich. 389; *Maxon v. Perrott*, 17 Mich. 332, 97 Am. Dec. 191; *Wood v. Bresnahan*, 63 Mich. 614; *Vanderhorst v. Bacon*, 38 Mich. 669.

In the note to 75 Am. Dec. 643, above quoted from, it is said: "Upon the question whether replevin may be maintained against an officer who takes property by virtue of a writ, the cases are conflicting, some authorities holding that the property is in the custody of the law, and hence replevin will not lie either for a third person whose property has been taken as that of the judgment debtor, or for the judgment debtor whose

In the case of the homestead, however, the rule is different. Such a sale is void and the pretended purchaser gets no title. The defendant's damages, if any,<sup>1</sup> can not exceed the costs and damages which he may sustain by reason of the officer's neglect to lay off to him his homestead.<sup>2</sup>

§ 775. **Liability for Neglect in caring for Property.**—It has been seen that the officer owes to the plaintiff in the writ the duty to exercise reasonable care and prudence in caring for property seized upon the writ. He is also under a like duty to the defendant. For there may be many cases in which the defendant will be entitled to have the property restored to

exempt property has been taken; Kellogg v. Churchill, 2 N. H. 412, 9 Am. Dec. 104; Gist v. Cole, 2 Nott & McO. (S. C.) 456, 10 Am. Dec. 616; Smith v. Huntington, 8 N. H. 76, 14 Am. Dec. 331; Spring v. Bourland, 11 Ark. 658, 54 Am. Dec. 243. Other authorities maintain that a third person, whose property has been levied on, may replevy it out of the hands of the officer who has taken it under a writ against another; but that this remedy does not lie in favor of an execution defendant whose exempt property has been levied on; Dunham v. Wyckoff, 8 Wend. (N. Y.) 280, 20 Am. Dec. 695; Bruen v. Ogden, 6 Halst. (N. J.) 370, 20 Am. Dec. 593; Allen v. Crary, 10 Wend. (N. Y.) 849, 25 Am. Dec. 566; Phillips v. Harris, 8 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166; Clark v. Skinner, 20 Johns. (N. Y.) 465, 11 Am. Dec. 802; Dearmon v. Blackburn, 1 Sneed (Tenn.) 390, 60 Am. Dec. 160. The rule of the common law, that property levied on under execution is *in custodia legis*, and cannot therefore be replevied from the possession of the levying officer, has been much modified in many states by statutes and codes of procedure, which permit this remedy to a stranger to the writ whose property has been levied

on, and in many states to the execution defendant also, whose exempt property has been taken. And even in the absence of statutes of this kind, logic and law would permit this remedy to the debtor. There are many authorities, however, which deny him this right. This subject is discussed in the notes to Dunham v. Wyckoff, 20 Am. Dec. 696-699; Kellogg v. Churchill, 9 *Id.* 105. That the debtor may maintain replevin, see the late cases: Carlson v. Small, 32 Minn. 492; Frazier v. Syas, 10 Neb. 115, 35 Am. Rep. 486; Douch v. Rahner, 61 Ind. 64; Chapin v. Hoel, 11 Ill. App. 309. In Mississippi, it is held that the debtor's statutory remedy is not exclusive, but that he may maintain replevin if he chooses. Ross v. Hawthorne, 55 Miss 551."

<sup>1</sup> A complaint alleging that a sheriff levied upon and sold the homestead of the plaintiff, states no cause of action. "If the property sold was a homestead," said TERRY, C. J., "the sheriff's deed conveyed nothing; the purchaser at such sale could acquire no right to the property, and the plaintiff suffer no injury." Kendall v. Clark, 10 Cal. 17, 70 Am. Dec. 691.

<sup>2</sup> McCracken v. Adler, 98 N. C. 400, 2 Am. St. Rep. 840.

him, as where it was seized without cause, or where before its sale the debt has been paid, or where, when seized upon mesne process, the plaintiff fails to obtain judgment. In such cases, if, through the negligence of the officer, the property has been lost or injured, he must answer in damages to the owner.<sup>1</sup>

The duty of the officer is confined to the keeping of the property, and he should not therefore ordinarily use the property, as to work a horse seized upon the writ,<sup>2</sup> and such a use, where the property has been injured, or it has been used by the officer for his own benefit or that of some person other than the debtor,<sup>3</sup> unless justified by peculiar circumstances, has been held to render the officer liable as a trespasser *ab initio*.<sup>4</sup> *A fortiori* would this be true if he cruelly overworks an animal taken on the writ.<sup>5</sup>

§ 776. **Liability for taking insufficient Security.**—The officer may also incur liability to the defendant by taking insufficient bonds or other securities in those cases in which the law has provided that such security shall be taken for the defendant's protection, as in an action of replevin. And where he takes such a bond as the statute does not authorize, or fails to comply with the statutory provisions for his own protection, he is held to assume the risk himself.<sup>6</sup>

§ 777. **Liability for Misconduct in making Sales.**—The defendant has also an interest in the manner in which his property

<sup>1</sup> As in *Barrett v. White*, 8 N. H. 210, 14 Am. Dec. 352, where the sheriff unnecessarily removed hay and grain seized by him, in the night time and in bad weather, whereby it was greatly injured and wasted; or in *Snydacker v. Broese*, 51 Ill. 357, 99 Am. Dec. 551, where the officer handled household goods, seized by him, in a rough and reckless manner, and carried them away exposed to a severe rain, by means of which they were injured.

See also *Abbott v. Kimball*, 19 Vt. 551, 47 Am. Dec. 708; *Hale v. Huntley*, 21 Vt. 152; *Nutt v. Wheeler*, 80

Vt. 489; *Tinker v. Morrill*, 89 Vt. 482; *Buck v. Ashley*, 87 Vt. 478.

Officer is liable where he so carelessly keeps the property that it is lost. *Conover v. Commonwealth*, 2 A. K. Marsh. (Ky.) 566, 12 Am. Dec. 451.

Officer is liable who fails to reasonably supply impounded animals with food and water. *Adams v. Adams*, 18 Pick. (Mass.) 384.

<sup>2</sup> *Bushey v. Rath*, 45 Mich. 181.

<sup>3</sup> And only in such cases, *Paul v. Slason*, 23 Vt. 281, 54 Am. Dec. 75.

<sup>4</sup> *Lamb v. Day*, 8 Vt. 407, 80 Am. Dec. 479.

<sup>5</sup> *Briggs v. Gleason*, 29 Vt. 78.

<sup>6</sup> *Fletcher v. Lee*, 65 Mich. 557.

shall be sold by the officer in pursuance of a writ against him. That interest is, if the property is to be sold at all, that it be sold at the proper time and place, on due notice, and that no more shall be sold than is sufficient to satisfy the writ. The officer, too, can justify any sale only by his writ and if he does an act which the writ will not justify, he is as to that a trespasser and may become a trespasser *ab initio*.

Hence if the officer sells without giving the notice required by law,<sup>1</sup> or if he sells the property at a different time<sup>2</sup> or place<sup>3</sup> from that named in the notice without adjournment to such time or place or without the consent of the execution debtor, or if he sells more than enough to satisfy the claim and costs,<sup>4</sup> or if he himself becomes the purchaser,<sup>5</sup> he is liable.

§ 778. **Liability for other Abuses of Process.**—On similar grounds, it is said,<sup>6</sup> an officer becomes responsible in damages for abuse of process, or is a trespasser *ab initio* by reason of such abuse, who omits to give an impounded beast reasonable food and water while under his care,<sup>7</sup> or who stays too long in a store where he has attached goods,<sup>8</sup> or keeps a keeper too long in possession of attached property,<sup>9</sup> or who places in a dwelling house an unfit person as keeper, against the owner's remonstrance.<sup>10</sup>

So the officer is liable for an abuse of process who unnecessarily makes a levy in the night time or accompanies his act with violence, insult, or oppression.<sup>11</sup>

<sup>1</sup> Hayes v. Buzzell, 60 Me. 205; Sawyer v. Wilson, 61 Me. 529; Carrier v. Esbaugh, 70 Penn. St. 239; Freeman v. Leonard, 99 N. C. 274.

<sup>2</sup> Smith v. Gates, 21 Pick. (Mass.) 55; Pierce v. Benjamin, 14 Pick. (Mass.) 356.

<sup>3</sup> Hall v. Ray, 40 Vt. 576, 94 Am. Dec. 440. See also Everts v. Burgess, 48 Vt. 208.

<sup>4</sup> Aldred v. Constable, 6 A. & E. (N. S.) 870, 881; Stead v. Gascoigne, 8 Taunt. 526; Shorland v. Govett, 5 B. & C. 485.

<sup>5</sup> Giberson v. Willber, 2 N. J. 410.

<sup>6</sup> C. ALLEN, J., in Wood v. Graves, 144 Mass. 365, 59 Am. Rep. 95.

<sup>7</sup> Adams v. Adams, 13 Pick. (Mass.) 384.

<sup>8</sup> Rowley v. Rice, 11 Metc. (Mass.) 337; Williams v. Powell, 101 Mass. 467, 8 Am. Rep. 396; Davis v. Stone, 120 Mass. 228.

<sup>9</sup> Cutter v. Howe, 122 Mass. 541.

<sup>10</sup> Malcom v. Spoor, 12 Metc. (Mass.) 379, 46 Am. Dec. 675.

<sup>11</sup> McElhenny v. Wylie, 3 Strob. (N. C.) 284, 49 Am. Dec. 643; Barrett v. White, 3 N. H. 210, 14 Am. Dec. 352; Beaird v. Foreman, Breece, (Ill.) 308, 12 Am. Dec. 197.

§ 779. **Liability for unlawfully Breaking into the Dwelling-house.**—Every man's dwelling-house, or, as it is often termed in the common law, his castle, affords to him certain privileges which the officer must respect. "A dwelling house," says Mr. Bishop, "is the apartment, building or cluster of buildings in which a man with his family resides."<sup>1</sup> The privacy and seclusion of this dwelling-house, not even the law may, in many cases, invade.

Thus an officer armed with civil process may not, in general, break and enter the outer walls or doors of the dwelling-house for the purpose of executing the writ, as to arrest the occupant, levy an execution upon his goods or serve upon him process for his appearance as a witness or a party to legal proceedings; and if the officers fails to respect this privilege, he is liable as a trespasser.<sup>2</sup>

The privilege of the dwelling-house does not, however, extend to the case of an officer armed with a lawful writ for the dispossession of the occupant,<sup>3</sup> nor, in most States, by statute, to the seizure upon a writ, as of replevin, of specific goods therein contained. Neither does it prevent the breaking to search a

<sup>1</sup> Bishop on Statutory Crimes, § 278.

The privilege, however, does not extend to stores, barns or other buildings disconnected from the dwelling-house, and forming no part of the curtilage: *Haggerty v. Wilber*, 16 Johns. (N. Y.) 286, 8 Am. Dec. 321; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145; *Penton v. Browne*, 1 Sid. 181, 186.

When distinct portions of the same building are used for a store and for a dwelling-house, and have a common outer entrance, an officer in serving process, *e. g.* a writ of attachment, may break the door to reach the goods in the store: *Stearns v. Vincent*, 50 Mich. 209, 45 Am. Rep. 87. The question is here fully and clearly discussed by COOLEY, J.

To the same effect: *Solinsky v. Lincoln Savings Bank*, 85 Tenn. 369, 4 S. W. Rep. 836.

But the rule is otherwise where the same room is used both as store and dwelling: *Welsh v. Wilson*, 24 Minn. 92, 24 N. W. Rep. 327.

<sup>2</sup> *Semayne's Case*, 5 Coke 91, 1 Smith's Lead. Cas. (9 Am. Ed.) 228; *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551; *Ilisley v. Nichols*, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145; *Swain v. Mizner*, 8 Gray (Mass.) 182, 69 Am. Dec. 244; *Keith v. Johnson*, 1 Dana (Ky.) 604, 25 Am. Dec. 167; *Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 679; *People v. Hubbard*, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; *Boggs v. Vandyke*, 3 Harr. (Del.) 268; *Calvert v. Stone*, 10 B. Mon. (Ky.) 152; *Curtis v. Hubbard*, 4 Hill (N. Y.) 437, 40 Am. Dec. 292.

<sup>3</sup> *Semayne's Case*, 5 Coke 91.

particular dwelling-house upon a lawful search warrant which describes it.<sup>1</sup>

In the case of criminal process the privilege does not exist for obvious reasons of public policy.<sup>2</sup> In such cases, "the right to break outer doors to make an arrest extends," says Mr. Bishop,<sup>3</sup> "to every sort of indictable wrong where the arresting party is acting under a lawful warrant, and to all lawful arrests for past offences, whether by officers or private individuals. It also extends to processes for legislative contempts and contempts to the ordinary courts of justice."

The officer may also lawfully break in to effect the re-arrest of one lawfully arrested out of the dwelling-house upon civil or criminal process who has escaped and fled thither for protection;<sup>4</sup> and having once gained lawful admission and begun the service of his process, he may, if ejected, lawfully break in to complete it;<sup>5</sup> or, if locked in, he may break out or others may break in to rescue him.<sup>6</sup>

The privilege is, however, confined to the outer doors and walls only, and if the officer has once gained peaceable admission through the outer door, he may then lawfully break inner doors, closets, trunks and other inclosures to complete the execution of his process.<sup>7</sup>

Before breaking either inner or outer doors, the officer must make known his business and demand admission.<sup>8</sup>

<sup>1</sup> *Cooper v. Booth*, 3 Esp. 185; *Bell v. Clapp*, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339. See also *Kneas v. Fidler*, 2 Serg. & R. (Penn.) 263.

<sup>2</sup> *Semayne's Case*, 5 Coke 91; *Launock v. Brown*, 2 B. & Ald. 592; *Burdett v. Abbott*, 14 East 1, 157; *Hawkins v. Commonwealth*, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147; *Commonwealth v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510; *Kneas v. Fidler*, 2 Serg. & R. (Penn.) 263; *State v. Shaw*, 1 Root (Conn.) 184; *Kelsy v. Wright*, 1 Root, 88; *State v. Smith*, 1 N. H. 346; *Barnard v. Bartlett*, 10 Cush. (Mass.) 501, 57 Am. Dec. 123.

<sup>3</sup> *Bishop on Crim. Proc.* I § 196.

<sup>4</sup> *Genner v. Sparkes*, 1 Salk. 79, 6

Mod. 173; *Oystead v. Shed*, 13 Mass. 520, 7 Am. Dec. 172; *Allen v. Martin*, 10 Wend. (N. Y.) 800, 25 Am. Dec. 564.

<sup>5</sup> *Sandon v. Jervis*, 4 Jur. (N. S.) 737, 5 *Id.* 860; *Allen v. Martin*, 10 Wend. (N. Y.) 800, 25 Am. Dec. 564.

<sup>6</sup> *White v. Wiltshire*, Cro. Jac. 555.

<sup>7</sup> *Lee v. Gansell*, Cowp. 1; *Lloyd v. Sandilands*, 8 Taunt. 250; *Hutchinson v. Birch*, 4 Taunt. 620; *State v. Thackam*, 1 Bay (S. C.) 358; *Williams v. Spencer*, 5 Johns. (N. Y.) 352; *Prettyman v. Dean*, 2 Harr. (Del.) 494.

<sup>8</sup> *Launock v. Brown*, 2 Barn. & Ald. 592; *Ratcliffe v. Burton*, 3 Bos. & P. 229; *Semayne's Case*, 5 Coke 91;

To constitute a breaking it is not necessary that the door be locked; it is sufficient if it is closed. Opening the closed door, as by lifting the latch, is then a breaking,<sup>1</sup> although the owner may be absent,<sup>2</sup> and makes the officer a trespasser if it be not authorized.

The dwelling-house of a third person affords no protection to the defendant; for the officer, being denied admission upon proper notice and demand, may lawfully break into the dwelling-house of A. to arrest B. on civil or criminal process, or to seize the goods of B. therein contained.<sup>3</sup> The officer can, however, it is held, justify the breaking of the door of third persons only by the event of finding therein the goods of the defendant,<sup>4</sup> and the same ruling has been made in respect to warrants for the arrest of the person<sup>5</sup> though the better authorities do not, in criminal cases at least, so confine the privilege but justify the officer if he had reasonable grounds to believe the defendant to be therein although the fact be otherwise.<sup>6</sup>

By the early English cases, though the officer unlawfully broke doors to make a levy and thus made himself a trespasser, yet the levy was held good,<sup>7</sup> but this distinction has been repudiated in the United States and the levy is held void.<sup>8</sup>

*Burdett v. Abbott*, 14 East. 1, 168; *Commonwealth v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510; *Hawkins v. Commonwealth*, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147.

<sup>1</sup> *Ratcliffe v. Burton*, 3 Bos. & Pul. 238; *Lee v. Gansel*, 1 Cowp. 1; *Penton v. Brown*, 1 Keb. 698; *Curtis v. Hubbard*, 1 Hill (N. Y.) 337, 4 *Id.* 437, 40 Am. Dec. 292.

<sup>2</sup> *Curtis v. Hubbard*, 1 Hill (N. Y.) 337.

<sup>3</sup> *Semayne's Case*, 5 Coke 91; *Oystead v. Shed*, 18 Mass. 520, 7 Am. Dec. 173; *Commonwealth v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510; *Hawkins v. Commonwealth*, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147; *State v. Shaw*, 1 Root (Conn.) 184; *Kelsey v. Wright*, 1 Root 83; *State v. Smith*, 1 N. H. 346; *Keith v. Johnson*, 1 Dana

(Ky.) 605, 25 Am. Dec. 167; *De Grafenreid v. Mitchell*, 3 McCord (S. C.) 506, 15 Am. Dec. 648.

Under this rule, not only the owner, but his children and domestic servants and permanent boarders are entitled to the protection of the dwelling-house: *Oystead v. Shed*, 18 Mass. 520, 7 Am. Dec. 173.

<sup>4</sup> *Johnson v. Leigh*, 1 Marsh 565; *Morrish v. Murrey*, 18 Mees. & W. 52; *Ratcliff v. Burton*, 3 B. & P. 229; *Cooke v. Birt*, 5 Taunt. 765.

<sup>5</sup> *Hawkins v. Commonwealth*, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147.

<sup>6</sup> *Commonwealth v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510; *Commonwealth v. Irwin*, 1 Allen (Mass.) 587.

<sup>7</sup> *Semayne's Case*, 5 Coke 91.

<sup>8</sup> *Ilaley v. Nichols*, 12 Pick.



## c. To Strangers to the Writ.

§ 780. **In general.**—The officer derives his authority to interfere with the goods or person of any one only from his writ, and the writ confers authority to seize the body or the goods of no one but the defendant named therein. Any interference, therefore, with the person or the property of a stranger, unless it be caused by the act of the stranger intervening between the officer and the lawful execution of his writ, makes the officer a trespasser. Hence—

§ 781. **Liability for Arrest upon Warrant against another.**—If the officer having a warrant for the arrest of one person arrests another, though of the same name,<sup>1</sup> he is liable to the latter,<sup>2</sup> unless the mistake was caused by the act or statement of the person arrested.<sup>3</sup> So is he liable where he arrests the right person, but by the wrong name, unless it be shown that he was known by one name as well as by the other.<sup>4</sup>

§ 782. **Liability for taking Goods of one Person on Writ against another.**—So the officer will be liable if he takes the goods of one person upon a writ against another.<sup>5</sup>

(Mass.) 270, 22 Am. Dec. 425 (explaining the *dictum* to the contrary of PARSONS, C. J., in *Widgery v. Haskell*, 5 Mass. 155, 4 Am. Dec. 41; *People v. Hubbard*, 24 Wend. (N. Y.) 369, 85 Am. Dec. 628; *Curtis v. Hubbard*, 4 Hill (N. Y.) 487, 40 Am. Dec. 292; *Closson v. Morrison*, 47 N. H. 482, 98 Am. Dec. 459.

<sup>1</sup> *Jarman v. Hooper*, 6 M. & G. 827, 847.

<sup>2</sup> *Formwalt v. Hylton*, 66 Tex. 288; *Hays v. Creary*, 60 Tex. 445; *Comer v. Knowles*, 17 Kans. 436.

<sup>3</sup> *Price v. Harwood*, 8 Camp. 108 (as where the person arrested asserts, when asked, that he is the person described); *Formwalt v. Hylton*, 66 Tex. 288.

<sup>4</sup> *Johnston v. Riley*, 13 Ga. 97; *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 456, a. c. 1 Wend. 126; *Mead v. Haws*,

7 Cow. (N. Y.) 332; *McMahan v. Green*, 84 Vt. 69, 80 Am. Dec. 665; *Shadgett v. Clipson*, 8 East 828; *Hoye v. Bush*, 1 Man. & G. 784; *Kelly v. Lawrence*, 8 H. & C. 1.

<sup>5</sup> *Allen v. Crary*, 10 Wend. (N. Y.) 849, 25 Am. Dec. 566; *Bruen v. Ogden*, 6 Halst. (N. J.) 370, 20 Am. Dec. 593; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Foraythe v. Ellis*, 4 J.J. Marsh. (Ky.) 298, 20 Am. Dec. 218; *Jamison v. Hendricks*, 2 Blackf. (Ind.) 94, 18 Am. Dec. 181; *Phillips v. Hall*, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108; *Symonds v. Hall*, 37 Me. 354, 59 Am. Dec. 53; *Lentz v. Chambers*, 5 Ired. (N. C.) L. 537, 44 Am. Dec. 68; *Pascal v. Ducros*, 8 Rob. (La.) 112, 41 Am. Dec. 294; *Duperron v. Van Wickle*, 4 Rob. (La.) 39, 39 Am. Dec. 509; *Overby v. McGee*, 15 Ark. 459, 63 Am. Dec. 49;

If the goods of a stranger have been negligently or fraudulently so commingled with the goods of the defendant that the officer can not distinguish them and the owner does not identify them, the officer may lawfully seize the whole mass and hold it until the stranger to the writ identifies and demands his own.<sup>1</sup> But the officer must distinguish them if he can,<sup>2</sup> and he will not be justified in seizing the whole if the owner be present and offers to select his own.<sup>3</sup>

So in executing writs against one of two or more co-tenants, though the officer may lawfully take into his possession and hold until the sale the whole of the common property,<sup>4</sup> he can legally sell only the interest of the defendant therein, and if he sells the entire interest he will be liable to the other co-owners.<sup>5</sup>

The liability of the officer may be enforced in an action of trespass or trover,<sup>6</sup> or, except in the case of co-tenants or other

*State v. Conover*, 4 Dutch. (N. J.) 324, 78 Am. Dec. 54; *Hanchett v. Williams*, 24 Ill. App. 56; *State v. Hope*, 88 Mo. 480; *Screws v. Watson*, 48 Ala. 638; *Duke v. Vincent*, 29 Iowa 308; *Wintringham v. Lafoy*, 7 Cow. (N. Y.) 785; *Wellman v. English*, 88 Cal. 588.

<sup>1</sup> *Smith v. Morrill*, 56 Me. 566; *Yates v. Wormell*, 60 Me. 495; *Shumway v. Rutter*, 8 Pick. (Mass.) 447, 19 Am. Dec. 840; *Overby v. McGee*, 15 Ark. 459, 63 Am. Dec. 49; *Bond v. Ward*, 7 Mass. 123, 5 Am. Dec. 28.

<sup>2</sup> *Carlton v. Davis*, 8 Allen (Mass.) 94; *Smith v. Sanborn*, 6 Gray (Mass.) 184.

<sup>3</sup> *Yates v. Wormell*, 60 Me. 495.

<sup>4</sup> See *Freeman on Cotenancy and Partition*, §§ 214, 215; *Caldwell v. Auger*, 4 Minn. 317, 77 Am. Dec. 515; *Welch v. Clark*, 12 Vt. 686, 36 Am. Dec. 868; *Waddell v. Cook*, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; *Reed v. Shepardson*, 2 Vt. 120, 19 Am. Dec. 697; *Heald v. Sargeant*, 15 Vt. 506, 40 Am. Dec. 694; *Bernal v. Hovious*, 17 Cal. 547, 79 Am. Dec. 147; *Veach v. Adams*, 51 Cal. 611; *Branch v. Wise-*

*man*, 51 Ind. 8; *Pettingill v. Bartlett*, 1 N. H. 87; *Blevins v. Baker*, 11 Ired. (N. C.) 291; *Haskins v. Everett*, 4 Sneed (Tenn.) 581; *Waldman v. Broder*, 10 Cal. 378; *Walsh v. Adams*, 3 Denio (N. Y.) 125; *Phillips v. Cook*, 24 Wend. (N. Y.) 889; *Whitney v. Ladd*, 10 Vt. 165; *Brown v. Lane*, 19 Tex. 208; *Converse v. McKee*, 14 Tex. 80.

<sup>5</sup> *Waddell v. Cook*, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; *Smyth v. Tankersley*, 20 Ala. 212, 56 Am. Dec. 193; *White v. Morton*, 22 Vt. 15, 52 Am. Dec. 75; *Rains v. McNairy*, 4 Humph. (Tenn.) 856, 40 Am. Dec. 651; *Heald v. Sargeant*, 15 Vt. 506, 40 Am. Dec. 694; *Lothrop v. Arnold*, 25 Me. 136, 48 Am. Dec. 256; *Edgar v. Caldwell*, *Morris* (Iowa) 484; *Neary v. Cahill*, 20 Ill. 214; *Sheppard v. Shelton*, 34 Ala. 652; *Melville v. Brown*, 15 Mass. 82; *Moulton v. Robinson*, 27 N. H. 550; *Mussey v. Cummings*, 34 Me. 74; *Frisbee v. Langworthy*, 11 Wis. 375.

<sup>6</sup> See cases cited in preceding note.

But in *Heald v. Sargeant*, 15 Vt. 506, 40 Am. Dec. 694, it was held, contrary to the great majority of the

owners of an undivided interest,<sup>1</sup> recovery of the specific property may be had by an action of replevin.<sup>2</sup>

The measure of damages is ordinarily the value of the goods taken, with interest,<sup>3</sup> but compensation may also be had for elements of aggravation or oppression where they are present.<sup>4</sup> But the officer may show matters in mitigation, as that the goods were afterwards seized and sold upon another and valid writ against the owner,<sup>5</sup> or that upon the sale they were bid in for the owner at an undervalue.<sup>6</sup>

The seizure and sale of the goods of one person upon a writ against another is, as has been seen, held to be such a breach of the officer's duty as to render liable the sureties upon his official bond.<sup>7</sup>

§ 783. *Liability for Levy on mortgaged Property.*—Analogous to the subject of the last section is that of the levy upon mortgaged chattels. Under the statutes or decisions of many of the States the interest of the mortgagor in such chattels may lawfully be seized and sold upon a proper writ against him,<sup>8</sup> but no more than his interest can be sold, and the officer will be liable to the mortgagee if he ignores, denies or refuses to respect the latter's claim.<sup>9</sup>

cases, that the officer could not be held liable as a trespasser *ab initio*.

<sup>1</sup> *Hackett v. Potter*, 181 Mass. 50; *Kimball v. Thompson*, 4 Cush. (Mass.) 447, 50 Am. Dec. 799; *Hart v. Fitzgerald*, 2 Mass. 509, 8 Am. Dec. 75; *Kindy v. Green*, 82 Mich. 810; *Price v. Talley*, 18 Ala. 21; *Parsons v. Boyd*, 20 Ala. 112; *Miller v. Eatman*, 11 Ala. 609; *Bell v. Hogan*, 1 Stew. (Ala.) 536; *Frierson v. Frierson*, 21 Ala. 549.

<sup>2</sup> *Carew v. Matthews*, 41 Mich. 576; *Cooper v. Tompkins*, 48 Mich. 406; *Heyman v. Covell*, 44 Mich. 332 (which maintain the right to bring replevin in a State court against a United States Marshal); *Gimble v.*

*Ackley*, 12 Iowa 27; *Smith v. Montgomery*, 5 Iowa 370; *Thompson v. Button*, 14 Johns. (N. Y.) 84.

<sup>3</sup> See *Sutherland on Damages*, Vol. III. pp. 487-537.

<sup>4</sup> *Pascal v. Ducros*, 8 Rob. (La.) 112, 41 Am. Dec. 294.

<sup>5</sup> *Curtis v. Ward*, 20 Conn. 204.

<sup>6</sup> *Forsyth v. Matthews*, 14 Penn. St. 100, 53 Am. Dec. 522.

<sup>7</sup> See *ante*, § 284.

<sup>8</sup> *Cary v. Hewitt*, 26 Mich. 228; *Macomber v. Saxton*, 28 Mich. 516; *Smith v. Judge*, 53 Mich. 560; *Daggett v. McClintock*, 56 Mich. 51; *Haynes v. Leppig*, 40 Mich. 602.

<sup>9</sup> *Williams v. Raper*, 67 Mich. 427.

13. *Tax Officers.*

§ 784. *Liability for not Levying Tax.*—The amount which shall be raised by tax in any given locality at a certain time is usually a matter left to the discretion of the officers to whom that subject is by law entrusted, but there are cases in which the duty to levy a specific tax becomes a fixed and imperative one, as where it has been directed to be done by a court of competent jurisdiction for the purpose of paying a judgment recovered against the municipality.

In such a case the act becomes one of a purely ministerial nature, and the officer is liable for its non-performance as in other cases of a like kind. Thus in the leading case<sup>1</sup> upon this subject, it was said by the Supreme Court of the United States, speaking through Mr. Justice SWAYNE: "The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender. The question of the rule by which the measure of damages is to be ascertained is not before us, and we do not feel called upon to express any opinion upon the subject."

§ 785. *Same Subject—The Measure of Damages.*—The question of the measure of damages arose, however, in the same court, a few years later, and the court then held that the plaintiff was entitled to recover the actual damages which he had sustained, as "the expense and cost of the vain effort to have the judgment placed on the tax list; the loss of the debt, if it had been lost; any impairment of the efficiency of the tax levy, if such there had been; in short, any conceivable actual damage," but that in the absence of any proof of actual damage, the defendants were liable to nominal damages and costs, and no more.<sup>2</sup>

The court, through Mr. Justice MILLER, said: "There is no

<sup>1</sup> *Amy v. Supervisors*, 11 Wall. (U. S.) 186.

<sup>2</sup> *Dow v. Humbert*, 91 U. S. 294.

profit in the office itself. It is undertaken mainly from a sense of public duty; and, if there be any compensation at all, it is altogether disproportionate to the responsibility and trouble assumed. They are in no sense the agents of creditors, and receive no compensation from holders of judgments or other claims against the town for the collection and payment of their debts. There are no prisons under their control, no prisoners committed to their custody, no *posse comitatus* to be brought to their aid; but without reward, and without special process of a court to back them, they are expected to levy taxes on the reluctant community at whose hands they hold the office. To hold that these humble but necessary public duties can only be undertaken at the hazard of personal liability for every judgment which they fail to levy and collect, whether through mistake, ignorance, inadvertence, or accident, as a sheriff is for an escape, without any proof that the judgment creditor has lost his debt, or that its value is in any manner impaired, is a doctrine too harsh to be enforced in any court where imprisonment for debt has been abolished."<sup>1</sup>

§ 786. **Same Subject—Action may be brought in foreign State.**—And not only may an action be maintained against the officer who neglects or refuses to levy the tax as it was his duty to do, but in a late case<sup>2</sup> in Missouri it is held that the action may be sustained in the courts of one State against the officer of another State, the court having acquired jurisdiction of the person.

The court distinguish the case from those in which the right of action depends upon a local statute,<sup>3</sup> saying, "The right of action against a ministerial officer for a violation or neglect of duty by one injured in consequence thereof is a different matter. The common law gave the party aggrieved an action against the officer in such case. There is authority<sup>4</sup> for the broader position that 'wherever, by either the common law or the statute law of a State, a right of action has become fixed, and a legal lia-

<sup>1</sup> Clark v. Miller, 54 N. Y. 528, was disapproved, and People v. Supervisors, 28 N. Y. 112, was approved.

<sup>2</sup> St. Joseph Ins. Co. v. Leland, 90 Mo. 177, 59 Am. Rep. 9.

<sup>3</sup> As in Vawter v. Missouri Pacific Ry. Co. 84 Mo. 679, 54 Am. Rep. 105.

<sup>4</sup> Dennick v. Railroad, 108 U. S. 18.

bility incurred, that liability may be enforced and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.'"<sup>1</sup>

§ 787. *Liability for false Return.*—Whether a collector of taxes may be held liable for a false return whereby an individual suffers injury, is a question whose determination depends upon the distinction already referred to—whether his duties are owing to individuals or to the public only, and upon this question the authorities are in conflict.

In a case<sup>2</sup> in Michigan it appeared that a tax collector had

<sup>1</sup>The court also cite *Leonard v. Navigation Co.* 84 N. Y. 48, 38 Am. Rep. 491; *McDonald v. Mallory*, 77 N. Y. 547, 38 Am. Rep. 664.

<sup>2</sup>*Raynsford v. Phelps*, 48 Mich. 342, 38 Am. Rep. 189. Said COOLEY, J.: It was decided in *Rowning v. Goodchild*, 2 W. Bl. 906, that a public officer having ministerial duties to perform in which a private individual has a special and direct interest, is liable to such individual for any injury sustained by him in consequence of the failure to perform such duties. It was an officer connected with the postal service who was held liable in that case, and the decision is followed in this country. *Teall v. Felton*, 1 N. Y. 587 (49 Am. Dec. 852) a. c. in error, 12 How. (U. S.) 284; election officers have been held liable on the same ground. (*Ashby v. White*, Ld. Raym. 938, 1 Salk. 19; *Lincoln v. Hapgood*, 11 Mass. 850; *Jeffries v. Ankeny*, 11 Ohio 872); and so have commissioners of highways (*Hover v. Barkhoof*, 44 N. Y. 113; *Hathaway v. Hinton*, 1 Jones (N. C.) 248); and so have inspectors of provisions (*Hayes v. Porter*, 22 Me. 871; *Nickerson v. Thompson*, 38 Me. 433; *Tardos v. Bozant*, 1 La. Ann. 199); and so have tax and other officers (*Amy v. Supervisors*, 11 Wall. (U. S.) 136; *Tracy v. Swart-*

*wout*, 10 Pet. (U. S.) 80; *Brown v. Lester*, 21 Miss. 392; *Bolan v. Williamson*, 1 Brev. (S. C.) 181). It is immaterial that the duty is one primarily imposed on public grounds, and therefore primarily a duty owing to the public; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance which it was in part the purpose of the law to protect him against. It is also immaterial that a failure in performance is made by the law a penal offense. *Hayes v. Porter*, 22 Me. 871. The exceptions are of those cases in which the functions of the office are judicial, or partake of the judicial. *Sage v. Laurain*, 19 Mich. 187; *Goetcheus v. Matthewson*, 61 N. Y. 420; *Bevard v. Hoffman*, 18 Md. 479 (81 Am. Dec. 618); *Harrington v. Commissioners, &c.*, 3 McCord 400. But even in these cases the officer is responsible if he acts maliciously. *Gordon v. Farrar*, 2 Doug. (Mich.) 411; *Bennett v. Fulmer*, 49 Penn. St. 157 (a mis-citation probably. *Burton v. Fulton*, 49 Penn. St. 151, was doubtless intended); *Gregory v. Brooks*, 37 Conn. 365; *Strickfadden v. Zipprick*, 49 Ill. 286.

The principle is as familiar as it is sound. It is nevertheless in-

falsely returned a warrant *nulla bona*, by reason of which the tax became a lien upon certain land which was sold for its satisfaction. At the time of the return, the plaintiff had a mortgage upon the same land, and he was compelled to redeem from the tax sale. He thereupon brought an action of trespass on the case against the collector for the damages thereby sustained. It

sisted that the present case is not within it. Tax collectors, it is truly said, are chosen because the machinery of government must be kept in motion, and to that end it is essential that the public revenue should be collected. They are chosen, therefore, and their duties imposed on public grounds, not on private. If through any negligence on the collectors' part, the State loses a portion of its dues, the officer is responsible to the State for the loss; but it is denied that he owes any duty to the individuals, except to abstain, as every citizen must, from committing trespasses on their rights. The question of negligence in the performance of public duties must always concern the public only.

But conceding that the law creates the office of collector in order that the public revenues may be collected, it does not follow that it leaves that officer at liberty to disregard private interests in their collection. When the law prescribes who shall be liable for the payment of taxes, and whose property may be levied upon therefor, it at the same time by implication forbids the officer to seize upon the property of others, or by act or omission make the tax a charge upon such property. The implied prohibition creates a duty in favor of the person whose property is the subject of it, and he is at liberty to buy or sell in reliance upon the duty being performed. He has a right to understand that the officer is

commissioned by the law to act only with due respect to the rights of individuals, and that if he acts otherwise and causes special injury, he disobeys his commission, and is not within the protection the commission might otherwise give.

The plaintiff owned a mortgage on lands, on which a tax was assessed for the year 1874. A warrant was issued for the collection of this tax, and was placed in the hands of defendant for service. The plaintiff's case is that during the life of this warrant, and while the defendant held it, there was personal property upon the land, belonging to one French, who had purchased the equity of redemption after the first Monday of May, and before the first Monday of December of that year, from which it was the duty of defendant, under the express provisions of the statute, to make collection. Comp. L. § 1006. Instead of performing this duty, he falsely made return of no goods, whereby the tax became established as a lien upon the land, and the land was sold for its satisfaction. Meantime the plaintiff had foreclosed his mortgage and become owner of the lands, and was compelled to redeem from the tax sale.

Is the plaintiff wronged by this false return? We think he is. It was his legal right that the goods of French should be sold to satisfy the tax, and the law always intends that legal rights shall be respected. Moreover, he alone suffered injury from

was urged in defense that the duty of the defendant was one owing to the public only, and that the individual had no right of action. But the court, per COOLEY, J., held that there was a duty owing to individuals, and as the plaintiff had suffered special injury, the action might be maintained.

But in a similar case<sup>1</sup> in Indiana, a different result was reached.

the false return. The public suffered nothing, for the lien on the land remained and was enforced, and the only injurious consequence of the misfeasance in public office was that the tax was collected from one man when the command of the law was that it should be collected from another.

If there is no wrong without a remedy, then it would seem that the action should be supported for the defendant is the only wrong-doer. It may be suggested that the plaintiff might have a cause of action against French for money paid to his use; but this is not clear. The statute does not make the purchaser of land under such circumstances personally liable; it only renders his property subject to seizure during the life of the tax warrant. Payment by defendant did not release the property of French, for it was released by the neglect of the officer which is complained of in this suit. The general rule is that taxes can only be enforced by means of the statutory remedies. *Crapo v. Stetson*, 8 Metc. (Mass.) 393; *Shaw v. Peckett*, 26 Vt. 432; *Camden v. Allen*, 26 N. J. L. 399; *Packard v. Tisdale*, 50 Me. 376; *Carondelet v. Picot*, 88 Mo. 125. But whether or not the rule applies here is immaterial, as this action in either case is well grounded in common law principles."

<sup>1</sup> *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169. Said the court per ELLIOTT, J.: "The failure of the treasurer to levy on personal prop-

erty does work some injury to the mortgagee, for it adds to the burdens borne by the mortgaged land, and thus lessens the value of the security, but while this is true, it is also true that the injury is indirect and remote. It is not enough in any case for a plaintiff, who seeks to recover for an injury caused by the negligence of another, to show simply injury and negligence; he must also show that there was a breach of duty owing to him. This general rule applies with peculiar force to persons who sue for injuries caused by official misconduct. It is not every person who sustains an injury from the negligence of a public officer that can maintain an action on the officer's bond.

In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of a particular duty owing to him. It is not sufficient to show a general public duty, or a duty to some other person directly interested. Judge COOLEY says: 'But the sheriff can only be liable to the person to whom the particular duty was owing; the party to whom he is bound by the duty of his office.' Cooley on Torts, 394, n. 1. In another elementary treatise it is said: 'It is a general rule that wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he has an interest in the



There the action was brought by a mortgagee against a county treasurer for the failure of that officer to collect taxes assessed

performance of the duty, and that the duty was imposed for his benefit.' *Shearm. & Redf. Neg.* § 174.

The adjudged cases illustrate and enforce this principle. In *Harrington v. Ward*, 9 Mass. 251, it was said: 'No action lies against the sheriff, either for his own default or for that of his deputy, but at the suit of one to whom the sheriff is bound by the duty of his office. In relation to a suit pending, whether in the service of the original writ, the execution or any intermediate process, he is answerable for his neglects to none but the plaintiff or the defendant in such suit.' The same principle is laid down in the cases of *Compton v. Pruitt*, 88 Ind. 171; *Gardner v. Heartt*, 8 Denio (N. Y.) 282, and *Bank of Rome v. Mott*, 17 Wend. (N. Y.) 554. In the last case cited, *COWEN, J.*, said: 'The law can not, in such cases, look beyond the proximate mischief resulting to a vested right, and do more than redress that mischief at the suit of the person immediately wronged.'

The case of *Strong v. Campbell*, 11 Barb. (N. Y.) 185, is an interesting and instructive one. It appeared in that case that a statute provided for the publication of the list of uncalled for letters, and that it should be made in the newspaper having the largest circulation in the town. Plaintiffs were publishers of such a paper; publication of the list was denied them, and it was held that they could not maintain an action, the court saying: 'To give a right of action for such a cause, the plaintiff must show that the defendant owed the duty to him personally. Wherever an action is brought for a breach of duty imposed by statute, the party

bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit.'

If we look to kindred cases we shall find strong support for this view, for the analogy is close and full. Thus in cases against attorneys for negligence, it is well settled that only the person with whom the attorney contracted can maintain the action, for it is to him alone that he owes a particular duty. *Fish v. Kelly*, 17 C. B. (N. S.) 194; *Savings Bank v. Ward*, 100 U. S. 195; *Commonwealth v. Harmer*, 6 Phila. 90; *Robertson v. Fleming*, 4 Macq. App. Cas. 167.

In *Ware v. Brown*, 2 Bond (U. S. D. C.) 267, a notary public had made a false certificate to a deed, and it was held that no one but the party to the original deed could maintain an action. So where a recorder gives an erroneous certificate, an action can be maintained only by the person to whom it was given. *Houseman v. Girard*, &c. Assn. 81 Penn. St. 256; *Wood v. Ruland*, 10 Mo. 148. Builders of public works are answerable only to their employers for want of skill and care in executing their contract: *Mayor v. Cunliff*, 2 N. Y. 165; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Castle v. Parker*, 18 L. T. Rep. (N. S.) 367. A railway company is not liable to an interloper for injuries resulting from negligence: *Lary v. Cleveland*, &c. R. Co. 78 Ind. 323; 41 Am. Rep. 572; *Everhart v. Terre Haute*, &c. R. Co. 78 Ind. 292, 41 Am. Rep. 567.

In *Winterbottom v. Wright*, 10 M. & W. 109, the plaintiff proved that a mail coach had been defectively constructed; that it was constructed under a contract with a public officer,

against the mortgagor out of personal property owned by him within the county, whereby the tax became a lien upon the

and that because of its defective construction plaintiff sustained an injury; and the court denied a recovery upon the ground that the coachmaker owed plaintiff no duty: Lord ABERNETHY, in the course of his opinion, said: 'Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.' This corresponds with Judge CLIFFORD's statement that 'There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect.' *Savings Bank v. Ward, supra.*

In *Dale v. Grant*, 5 Vroom (N. J.) 142, it was held that an action would not lie in favor of a customer against a wrong-doer who stopped the machinery of a manufactory and prevented the manufacturer from performing a contract, and thereby caused loss to the plaintiff, to whom the manufacturer had agreed to furnish goods. The court said: 'But the law does not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs and who may have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*.' Interesting discussions of kindred questions are contained in *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543, and *Anthony v. Slaid*, 11 Metc. 390.

A departure from these settled and salutary principles would involve us in doubt and confusion; once departed from there would be no rule by which the liability of sureties on official bonds could be measured. Everything would be involved in uncertainty, and sureties might be harassed by actions for causes never contemplated. If we say a mortgagee may maintain an action like this, then is there any reason why a judgment creditor, the holder of a mechanics' lien, the possessor of a vendor's lien, or even the owner of a tax title, might not successfully sue? If we abide not by the settled rules, who shall set limits, and what shall be the guide?

The only case we have found in conflict with the doctrine here approved is *Raynsford v. Phelps*, 48 Mich. 343 (38 Am. Rep. 169, *ante*), and we cannot yield to it, although the opinion was prepared by Judge COOLEY, a judge whose opinions are always entitled to respect. It seems to us that the doctrine of that case cannot be harmonized with the rule declared in the learned judge's work on torts, to which we have already referred. The error in the decision under immediate mention is, we deferentially submit, clearly proved by the nicely drawn and accurately marked distinctions found in the author's discussion of the liability of recorders of deeds. *Cooley, Torts*, 388, 387.

The case under examination is very different from that of an officer committing a direct and willful tort, and, as is clearly shown by Judge COOLEY, radically different from that of an officer who has duties imposed

mortgaged land. It was urged there, as held in *Michigan*, that there was the breach of a duty owing to the individual for which he might sustain an action, but the court held that the duty was one imposed solely for the benefit of the public and that the plaintiff had no right of action. The decision in the *Michigan* case was cited and disapproved.

## B.

## FOR DEFAULTS OF HIS OFFICIAL SUBORDINATES.

§ 788. *In general.*—Having now seen what liability attaches to the public officer for his own defaults, there remains to be considered here the liability which he incurs by reason of the defaults of his official subordinates.

Of the various classes of public officers, attention will be directed first to public officers of the government.

## I.

## PUBLIC OFFICERS OF GOVERNMENT.

§ 789. *Public Officer of Government not liable for Acts of his official Subordinates.*—It is well settled as a general rule that public officers of the government, in the performance of their public functions, are not liable to third persons, either for the misfeasances or positive wrongs, or for the non-feasances, negligences or omissions of duty of their official subordinates.<sup>1</sup>

upon him directly for the benefit of individuals. It is plain to us that the duty of collecting taxes is imposed upon the treasurer for the benefit of the public, and not for the benefit of individuals."

<sup>1</sup> *Robertson v. Sichel*, 127 U. S. 507, 515; *City of Richmond v. Long*, 17 Gratt. (Va.) 375, 94 Am. Dec. 461; *Sawyer v. Corse*, 17 Gratt. (Va.) 280, 94 Am. Dec. 445; *Dunlop v. Munroe*, 7 Cranch (U.S.) 242; *Tracy v. Cloyd*,

10 W. Va. 19; *Lane v. Cotton*, 1 Ld Raym. 646; *Whitfield v. Lord Le Despencer*, 2 Cowp. 754; *Keenan v. Southworth*, 110 Mass. 474, 14 Am. Rep. 613; *Foster v. Metts*, 55 Miss. 77, 80 Am. Rep. 504; *Schroyer v. Lynch*, 8 Watts (Penn.) 453; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632; *Booth v. Lloyd*, 38 Fed. Rep. 593; *Ely v. Parsons*, 55 Conn. 88, 10 Atl. Rep. 499.

This immunity rests upon obvious considerations of public policy, the necessities of the public service and the perplexities and embarrassments of a contrary doctrine.<sup>1</sup>

These official subordinates are themselves public officers, though of an inferior grade, and are directly liable, in those cases in which any such public officer is liable, for their own defaults.<sup>2</sup> They are not infrequently appointed directly by the governmental power, and are removable only at its pleasure, but even in those cases in which they are appointed and removed by their immediate official superior, the latter is not liable.<sup>3</sup>

§ 790. **Same Subject—Exceptions to this Rule.**—But this general rule is subject to certain exceptions, important to be borne in mind and as well settled as the rule itself. Thus the superior officer will be liable, (1) where, being charged with the duty of employing or retaining his subordinates, he negligently or wilfully employs or retains unfit or improper persons;<sup>4</sup> or, (2) where, being charged with the duty to see that they are appointed or qualified in a proper manner, he negligently or wilfully fails to require of them the due conformity to the prescribed regulations;<sup>5</sup> or (3) where he so carelessly or negligently oversees, conducts or carries on the business of his office as to furnish the opportunity for the default;<sup>6</sup> or (4) and *a fortiori*, where he has directed, authorized or co-operated in the wrong.<sup>7</sup>

§ 791. **This Rule applies—1. To Post officers.**—This rule has frequently been applied to the officials of the post-office department, and the law is well settled, both in England and America, that the postmaster-general, the local postmasters and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own defaults only, and not for those of any of the others, although selected by him and subject to his orders,<sup>8</sup> unless he has negligently or wil-

<sup>1</sup> City of Richmond v. Long, 17 Gratt. (Va.) 875, 94 Am. Dec. 461.

<sup>2</sup> See *ante*, § 657 *et seq.*

<sup>3</sup> Keenan v. Southworth, 110 Mass. 474, 14 Am. Rep. 618.

<sup>4</sup> Wiggins v. Hathaway, 6 Barb. (N. Y.) 633; Schroyer v. Lynch, 8 Watts (Penn.) 453.

<sup>5</sup> Bishop v. Williamson, 11 Me. 495.

<sup>6</sup> Dunlop v. Munroe, 7 Cranch (U. S.) 243; Schroyer v. Lynch, 8 Watts (Penn.) 453; Ford v. Parker, 4 Ohio St. 576.

<sup>7</sup> Ely v. Parsons, 55 Conn. 88, 10 Atl. Rep. 499; Tracy v. Cloyd, 10 W. Va. 19.

<sup>8</sup> Keenan v. Southworth, 110 Mass. 474, 14 Am. Rep. 618; Lane v. Cot-

fully appointed or retained unfit or improper persons,<sup>1</sup> or has failed to require of them conformity to the prescribed regulations;<sup>2</sup> or has so carelessly conducted the affairs of his office as to furnish opportunity for such default;<sup>3</sup> or unless he has co-operated in or authorized the wrong.<sup>4</sup>

§ 792.—2. **To Mail Contractors.**—The same rule has also been extended for the protection of contractors for carrying the mail so as to exempt them from liability for the defaults of their agents, assistants and subordinates, on the ground that these latter are themselves public officers and alone liable for their own defaults.<sup>5</sup> It is believed, however, that the better opinion is the other way.<sup>6</sup>

§ 793.—3. **To Collectors of Customs.**—So a collector of customs is not personally liable for a tort committed by his subordinates, there being no evidence to connect the collector personally with the wrong, or that the subordinates were not competent or were not properly selected for their positions.<sup>7</sup>

§ 794.—4. **To Captain of a Ship of War.**—So it has been held that the captain of a ship of war, whose subordinate officers are appointed by the government, is not liable for an injury caused by the negligence of his lieutenant.<sup>8</sup>

§ 795.—5. **To Confederate District Commissary.**—And a con-

ton, 1 *Ld. Raym.* 646; *Whitfield v. Lord Le Despencer*, 2 *Cowp.* 754; *Dunlop v. Munroe*, 7 *Cranch* (U. S.) 242; *Schroyer v. Lynch*, 8 *Watts* (Penn.) 453; *Bishop v. Williamson*, 11 *Me.* 495; *Hutchins v. Brackett*, 22 *N. H.* 252, 53 *Am. Dec.* 249; *Foster v. Metts*, 55 *Miss.* 77, 80 *Am. Rep.* 504.

See *ante* § 713.

<sup>1</sup> *Wiggins v. Hathaway*, 6 *Barb.* (N. Y.) 632.

<sup>2</sup> *Bishop v. Williamson*, 11 *Me.* 495. In this case the postmaster was held liable for the default of an assistant whom he had not required to take the oath prescribed by law. To same effect: *Sawyer v. Corse*, 17 *Gratt.*

(Va.) 230, 94 *Am. Dec.* 445; *Bolan v. Williamson*, 1 *Brev.* (S. C.) 181.

<sup>3</sup> *Dunlop v. Munroe*, 7 *Cranch* (U. S.) 242; *Ford v. Parker*, 4 *Ohio St.* 576.

<sup>4</sup> *Tracy v. Cloyd*, 10 *W. Va.* 19.

<sup>5</sup> *Conwell v. Voorhees*, 13 *Ohio* 538, 42 *Am. Dec.* 206; *Hutchins v. Brackett*, 22 *N. H.* 252, 53 *Am. Dec.* 248.

<sup>6</sup> *Sawyer v. Corse*, 17 *Gratt.* (Va.) 230, 94 *Am. Dec.* 445; *Foster v. Metts*, 55 *Miss.* 77, 80 *Am. Rep.* 504.

<sup>7</sup> *Robertson v. Sichel*, 127 *U. S.* 507; *Brissac v. Lawrence*, 2 *Blatchf.* (U. S. C. C.) 121.

<sup>8</sup> *Nicholson v. Mounsey*, 15 *East* 384.

federate district commissary in Virginia during the late war was held not to be responsible for the misfeasance and wrong doings of his subordinates unless he co-operated in or authorized the wrong.<sup>1</sup>

## II.

### PUBLIC TRUSTEES AND COMMISSIONERS.

§ 796. **Not liable for Negligence of Subordinates.**—The same rule of immunity has also been extended to the case of persons acting in the capacity of public agents engaged in the public service and acting solely for the benefit of the public, although not strictly filling the character of officers or agents of the government.

Thus it has been held that overseers of highways entrusted with the supervision of highways, discharging the duty gratuitously and being personally guilty of no negligence, are not responsible for an injury sustained by an individual through the negligence of workmen employed under them.<sup>2</sup>

So trustees and commissioners acting gratuitously for the benefit of the public, and guilty of no personal negligence, who are entrusted with the conduct of public works, are not liable for an injury occasioned by the negligence or unskillfulness of workmen and contractors employed by them in the execution of the work.<sup>3</sup>

So trustees of schools, charged with the safe keeping of the school property, and authorized to make needful repairs within certain limits, who act gratuitously and without any personal negligence or omission of duty, can not be held liable to one who is injured by the negligence of workmen whom they have employed to make repairs upon a school building.<sup>4</sup>

<sup>1</sup>Tracy v. Cloyd, 10 W. Va. 19.

<sup>2</sup>Holliday v. St. Leonard, 11 Com. Bench (N. S.) 193; Duncan v. Findlater, 6 Cl. & Fin. 894; Humphreys v. Mears, 1 M. & R. 187.

<sup>3</sup>Hall v. Smith, 3 Bing. 156; Harris v. Baker, 4 M. & S. 27; Sutton v. Clarke, 6 Taunt. 84.

<sup>4</sup>Donovan v. McAlpin, 85 N. Y.

185, 89 Am. Rep. 649. In this case ANDREWS, J., said: "The trustees, in directing the repairs to be made, and in employing workmen for that purpose, were acting within the scope of their authority. They were charged with the safe-keeping of the school property in their ward, and authorized to make needful repairs

In the same line it is held that the trustees of Brooklyn bridge, not themselves in fault, are not liable for an accident caused by the negligence of a laborer employed on the bridge.<sup>1</sup>

So commissioners of emigration are not liable for a loss of baggage through the acts or defaults of the owners or masters of ships licensed by them.<sup>2</sup> And county commissioners are not liable for an injury occasioned by the neglect of laborers employed by a supervisor of roads, although the latter was appointed by them.<sup>3</sup>

### III.

#### MINISTERIAL OFFICERS.

§ 797. **Liable for Defaults of their Deputies.**—But in the case of ministerial, executive and administrative officers who are

within certain limits. The employment of workmen for this purpose was necessary, and if they employed competent men, and exercised reasonable supervision over the work, their whole duty as public officers was discharged. They were acting as gratuitous agents of the public, and it could not be expected that they should be personally present at all times during the progress of the work, to supervise the conduct of the workmen. It was said by *BEST*, C. J., in *Hall v. Smith*, 2 Bing. 156, that no action can be maintained against a man, acting gratuitously for the public, for the consequence of any act which he was authorized to do, and which, so far as he is concerned, is done with care and attention, and that such a person is not answerable for the negligent execution of an order properly given; and it was said by *NELSON*, C. J., in *Bailey v. Mayor*, 8 Hill (N. Y.) 538, (38 Am. Dec. 669), that if a public officer authorize the doing of an act not within the scope of his authority,

or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ.

In this case it must be assumed that the defendants were not chargeable with personal negligence, and they omitted no duty imposed upon them by law. It would be equally opposed to justice and sound public policy to make them answerable for the negligence of the workmen. They were acting as public officers, and, in respect to the acts of persons necessarily employed by them, the doctrine of *respondet superior* has no application. *Story on Agency*, § 821."

See also *Finch v. Board of Education*, 80 Ohio St. 37, 27 Am. Rep. 414; *Donovan v. Board of Education*, 85 N. Y. 117.

<sup>1</sup> *Walsh v. Trustees*, 96 N. Y. 487.

<sup>2</sup> *Murphy v. Commissioners*, 28 N. Y. 134.

<sup>3</sup> *County Commissioners v. Duval*, 54 Md. 350, 39 Am. Rep. 393.

charged with the performance of duties to individuals, a different rule applies. These officers, as has been seen, are bound to perform their duties in a legal and proper manner, exercising due care and diligence, and respecting and protecting the legal rights of others.<sup>1</sup> This responsibility can not be evaded by delegating the performance to another, but, whether the officer acts in person or through the medium of another, his legal duties and responsibilities remain the same.

The rule is, therefore, as just as it is well settled, that the ministerial, executive or administrative officer who owes a duty to an individual is liable to that individual for the misfeasance, malfeasance or non-feasance of his deputy to whom he has confided its performance, so long as the deputy acts by color of his office.<sup>2</sup> That the deputy is himself, to some extent, regarded as an independent officer does not diminish this liability,<sup>3</sup> nor does the fact that the person complaining requested the services of that particular deputy,<sup>4</sup> unless he is a *special* deputy appointed for that particular service at the nomination and request of the complainant.<sup>5</sup>

But the officer is not liable for the extra-official acts or misconduct of his deputy, as where the latter goes outside the execution of his duty, impelled by some private motive or malice of his own;<sup>6</sup> nor for the omission or neglect of any act or duty which the law does not require him officially to perform;<sup>7</sup> nor for the consequences of acts which were directed by the complaining party himself.<sup>8</sup>

<sup>1</sup> See *ante*, §§ 664-679.

<sup>2</sup> *Hazard v. Israel*, 1 Binn. (Penn.) 240, 2 Am. Dec. 438; *Forsythe v. Ellis*, 4 J. J. Marsh (Ky.) 298, 20 Am. Dec. 218; *Kennon v. Ficklin*, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776; *Harrington v. Fuller*, 18 Me. 277, 36 Am. Dec. 719; *State v. Moore*, 19 Mo. 369, 61 Am. Dec. 563; *Flanagan v. Hoyt*, 36 Vt. 565, 86 Am. Dec. 675; *Prosser v. Coots*, 50 Mich. 263; *McNutt v. Livingston*, 7 Smedes & M. (Miss.) 641; *Snedecor v. Davis*, 17 Ala. 473; *Wood v. Farnell*, 50 Ala. 546; *Welches v. Edsell*, 2 McLean (U. S. C. C.) 386; *Van Schaick v. Sigel*, 60 How. Pr. 122.

See generally the cases cited in the following sections:

<sup>3</sup> See *Campbell v. Phelps*, 1 Pick. (Mass.) 62, 11 Am. Dec. 139; *Draper v. Arnold*, 13 Mass. 449.

<sup>4</sup> *Van Schaick v. Sigel*, 60 How. (N. Y.) Pr. 122.

<sup>5</sup> *Skinner v. Wilson*, 61 Miss. 90.

<sup>6</sup> See *State v. Moore*, 19 Mo. 369, 61 Am. Dec. 563.

<sup>7</sup> *Harrington v. Fuller*, 18 Me. 277, 36 Am. Dec. 719; *Knowlton v. Bartlett*, 1 Pick. (Mass.) 279; *Cook v. Palmer*, 6 B. & C. 739.

<sup>8</sup> *Gorham v. Gale*, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; *Sheldon v.*



§ 798. **This Rule applies—1. To Sheriffs.**—This rule has been most frequently applied to sheriffs, and it is well settled that the sheriff is liable for the misconduct, abuses, trespasses or neglect of his deputy, acting by color of his authority,<sup>1</sup> and must respond for all damages which he may thereby occasion either to the plaintiff<sup>2</sup> in the process or to the defendant<sup>3</sup> or to strangers.<sup>4</sup>

This is so completely the liability of the sheriff as such that the sureties upon the latter's official bond must answer for it.<sup>5</sup>

But the sheriff is not liable for the wanton, extra official acts of his deputy,<sup>6</sup> nor for the neglect or omission of an act which it was not his legal duty to perform,<sup>7</sup> nor for the results of acts which the complaining party himself directed to be done,<sup>8</sup> nor for the act of a special deputy nominated by the complaining party and appointed at his request.<sup>9</sup>

The sheriff and his deputy are one person in law, so far as to make the former responsible for the acts of the latter, but not so far as to require impossibilities of the sheriff or to impose un-

Payne, 7 N. Y. 458; Acker v. Ledyard, 8 Barb. (N. Y.) 517.

<sup>1</sup> Hazard v. Israel, 1 Binn. (Pinn.) 240, 2 Am. Dec. 488; Forsythe v. Ellis, 4 J.J. Marsh (Ky.) 298, 20 Am. Dec. 218; Kennon v. Ficklin, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776; Harrington v. Fuller, 18 Me. 277, 36 Am. Dec. 719; State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; Flanagan v. Hoyt, 86 Vt. 565, 86 Am. Dec. 675; Prosser v. Coots, 50 Mich. 262.

<sup>2</sup> Blunt v. Sheppard, 1 Mo. 219; Marshall v. Hosmer, 4 Mass. 60; Esty v. Chandler, 7 Mass. 464; McIntyre v. Trumbull, 7 Johns. (N. Y.) 35; Mason v. Ide, 30 Vt. 697; Seaver v. Pierce, 42 Vt. 325; Whitney v. Farrar, 51 Me. 418; Ross v. Campbell, 19 Hun (N. Y.) 615; Smith v. Judkins, 60 N. H. 127.

<sup>3</sup> Grinnell v. Phillips, 1 Mass. 529; Knowlton v. Bartlett, 1 Pick. (Mass.) 270.

<sup>4</sup> Campbell v. Phelps, 17 Mass. 244; Norton v. Nye, 56 Me. 211; Rider v. Chick, 59 N. H. 50.

<sup>5</sup> State v. Moore, 19 Mo. 369, 61 Am. Dec. 563.

<sup>6</sup> State v. Moore, 19 Mo. 396, 61 Am. Dec. 563.

<sup>7</sup> Harrington v. Fuller, 18 Me. 277, 36 Am. Dec. 719; Knowlton v. Bartlett, 1 Pick. (Mass.) 270; Cook v. Palmer, 6 B. & C. 739. As in foreclosing a chattel mortgage, as the agent of the mortgagee, Dorr v. Mickley, 16 Minn. 20; or in performing any other unofficial act: Moulton v. Norton, 5 Barb. (N. Y.) 286.

<sup>8</sup> Eastman v. Judkins, 59 N. H. 576; Odom v. Gill, 59 Ga. 180; Smith v. Berry, 37 Me. 298; Stevens v. Colby, 46 N. H. 163; Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Sheldon v. Payne, 7 N. Y. 458; Acker v. Ledyard, 8 Barb. (N. Y.) 517.

<sup>9</sup> Skinner v. Wilson, 61 Miss. 90.

conscionable exactions. And the mere omission of a deputy to inform the sheriff that he has process in his hands is not such negligence as to charge the sheriff in case a writ last in hand is executed first.<sup>1</sup> So the legal identity of the sheriff with his deputies cannot be extended so far as to make the sheriff chargeable with notice of all that has come to the knowledge of any of his deputies. Hence where an execution is delivered to a deputy sheriff who returns it unsatisfied for want of property and the sheriff, without notice of the execution in the hands of his deputy, finds property and seizes it upon a junior execution against the same defendant, he is not liable to the senior execution creditor for having first satisfied the junior execution.<sup>2</sup>

§ 799. 2. *To Recordors of Deeds.*—The rule applies also to recordors of deeds who are liable for the negligence or misconduct of their deputies in recording deeds, and in making searches and abstracts of title.<sup>3</sup>

§ 800. 3. *To Clerks of Courts.*—And to clerks of courts for the defaults of their deputies.<sup>4</sup>

§ 801. 4. *To other Officers.*—The rule of liability is also extended by statute to the case of a great variety of officers who are authorized to appoint deputies and who are made responsible for their defaults.<sup>5</sup>

## C.

### FOR DEFAULTS OF HIS PRIVATE SERVANT OR AGENT.

§ 802. *Liable for Torts of private Servant or Agent.*—A public officer of whatever grade is subject to the same liability for the negligence or other defaults of his private servant or agent as adheres to any other principal. Hence when the subordinate, whose acts are the subject of the inquiry, “holds not

<sup>1</sup> *Whitney v. Butterfield*, 13 Cal. 335, 78 Am. Dec. 584.

<sup>2</sup> *Russell v. Lawton*, 14 Wis. 202, 80 Am. Dec. 769.

<sup>3</sup> *Van Schaick v. Sigel*, 60 How. (N. Y.) Pr. 122. See *Smith v. Holmes*, 54 Mich. 104.

<sup>4</sup> *McNutt v. Livingston*, 7 Sm. & M. (Miss.) 641; *Snedicor v. Davis*, 17 Ala. 472; *Welldes v. Edsell*, 2 McLean (U. S. C. C.) 366.

<sup>5</sup> Probate judge liable for default of his clerk: *Wood v. Farnell*, 50 Ala. 546.

an office known to the law, but his appointment is private and discretionary with the officer, the principal is responsible for his acts.”<sup>1</sup>

This distinction was applied in the case of a mail carrier who was held, contrary to some cases previously referred to,<sup>2</sup> to be not a public officer but the mere private servant or agent of the contractor, who was therefore liable for the carrier's negligence or default in the performance of his duties.<sup>3</sup>

It has also been applied to the case of a laborer employed by a selectman to cut brush and trees in order to make a highway passable, and who, while so engaged, through mistaken judgment but not maliciously or wantonly, cut down some trees upon the land of an adjoining proprietor, the removal of which was not necessary. The selectman was held liable.<sup>4</sup>

<sup>1</sup> Note to 1 Am. Lead Cases (Willson v. Peverly), p. 785, quoted in Ely v. Parsons, 55 Conn. 83, 10 Atl. Rep. 499.

<sup>2</sup> See *ante*, § 791.

<sup>3</sup> Sawyer v. Corse, 17 Gratt. (Va.) 280, 94 Am. Dec. 445.

<sup>4</sup> Ely v. Parsons, 55 Conn. 83, 10 Atl. Rep. 499.

## CHAPTER VII.

### OF THE LIABILITY OF PUBLIC OFFICERS ON CONTRACTS.

#### I. IN GENERAL.

§ 803. Government can act only through its Officers or Agents.

804. Officer or Agent should act only in Name of the Government.

805. Public Agents are presumed not to be personally liable.

806. Will not be held liable except where Intent is clear to make them so.

807. To what Contracts this Rule extends.

808. But where Intent is clear, they will be personally charged.

809. Public Officer not ordinarily held to an implied Warranty of Authority.

810. But Officer may be bound by express Representation as to his Authority.

811. Or where he is guilty of Fraud or Misrepresentation.

812. Officer may be liable where knowing he has no Authority, he makes Contract implying its Existence.

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#### I.

#### IN GENERAL.

§ 803. Government can act only through its Officers or Agents.  
—From the very nature of the case it is evident that the public  
—the government, be it national, state or lesser municipal, can

deal with third persons and enter into contracts with them, only through the instrumentality of its public officers or agents, duly authorized by law and acting within the scope of the authority conferred upon them.<sup>1</sup>

§ 804. **Officer or Agent should act only in Name of the Government.**—As in the case of the agent of a private principal, though with stronger reasons, the public officer or agent in his dealings with third persons should disclose the fact and the nature of his representative capacity, and, in his contracts and dealings, should act only in the name of his principal.<sup>2</sup>

§ 805. **Public Agents are presumed not to be personally liable.**—A well defined distinction is made by the law between contracts entered into by the agent of a private principal and those of the agents of the public.<sup>3</sup> It is constantly presumed that the latter do not intend personally to assume the public burdens, and that persons dealing with them do not rely upon their individual responsibility.<sup>4</sup> “On the contrary,” says Judge STORY,<sup>5</sup> “the natural presumption in such cases is that the contract was made upon the credit and responsibility of the government itself, as possessing an entire ability to fulfil all its just contracts, far beyond that of any private man; and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy.”

“It much against public policy,” says BEASLEY, C. J., “to cast the obligations that justly belong to the body politic, upon this class of officials.”<sup>6</sup>

<sup>1</sup> See *Mayor of Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *People v. Talmage*, 6 Cal. 256; *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *State v. Little Rock, &c.*, Ry. 31 Ark. 701; *Osborne v. Tunis*, 25 N. J. L. 638.

<sup>2</sup> See *Mechem on Agency*, § 417; *White v. Cuyler*, 6 T. R. 176; *Brinley v. Mann*, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; *Hale v. Woods*, 10 N. H. 470, 84 Am. Dec. 176; *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Clealand v. Walker*,

11 Ala. 1058, 46 Am. Dec. 233; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 53 Am. Dec. 771.

<sup>3</sup> See *Mechem on Agency*, § 436.

<sup>4</sup> *Knight v. Clark*, 48 N. J. L. 23, 57 Am. Rep. 534; *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *Crowell v. Crispin*, 4 Daly (N. Y.) 100; *Tippett v. Walker*, 4 Mass. 595, 597; *Pine v. Huber Mfg. Co.*, 83 Ind. 121.

<sup>5</sup> *Story on Agency*, § 302.

<sup>6</sup> In *Knight v. Clark*, 48 N. J. L. 23, 57 Am. Rep. 534.

§ 806. Will not be held personally liable except where the intent is clear to make him so.—Hence it is well settled, as a general rule, that public officers and agents will not be held personally liable upon contracts entered into by them in the public behalf,<sup>1</sup> except in those cases where the intent is clearly apparent so to bind them.<sup>2</sup> And, as is said by Chief Justice MARSHALL, “The intent of the officer to bind himself personally must be very apparent indeed to induce such a construction of the contract.”<sup>3</sup>

§ 807. To what Contracts this Rule extends.—This rule applies not only to simple contracts whether written or unwritten but to sealed instruments as well.<sup>4</sup> The fact that the agent of a

<sup>1</sup>Hodgson v. Dexter, 1 Cranch (U. S.) 845; Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 534; Jones v. Le Tombe, 8 Dall. (U. S.) 884; Fox v. Drake, 8 Cow. (N. Y.) 191; Tutt v. Hobbs, 17 Mo. 486; Miller v. Ford, 4 Rich. (S. C.) L. 376, 55 Am. Dec. 667; Brown v. Austin, 1 Mass. 208, 2 Am. Dec. 11; McClellicks v. Bryant, 1 Mo. 598, 14 Am. Dec. 810; Belknap v. Reinhart, 2 Wend. (N. Y.) 375, 20 Am. Dec. 631; Stinchfield v. Little, 1 Greenl. (Me.) 281, 10 Am. Dec. 65; Dawes v. Jackson, 9 Mass. 490; Freeman v. Otis, 9 Mass. 373, 6 Am. Dec. 66; Walker v. Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 834; Wallis v. Johnson School Township, 75 Ind. 868; Macbeath v. Haldinand, 1 T. R. 173; Bowen v. Morris, 2 Taunt. 874; Unwin v. Wolseley, 1 T. R. 674; Brown v. Austin, 1 Mass. 208, 2 Am. Dec. 11; Dawes v. Jackson, 9 Mass. 490; Bainbridge v. Downie, 6 Mass. 253; Osborne v. Kerr, 13 Wend. (N. Y.) 179; Rathbon v. Budlong, 15 Johns. (N. Y.) 1; Mott v. Hicks, 1 Cow. (N. Y.) 513, 18 Am. Dec. 550; Sheffield v. Watson, 8 Caines (N. Y.) 69; Bronson v. Woolsey, 17 Johns. (N. Y.)

46; Bernard v. Torrance, 5 Gill. & J. (Md.) 388; Enloe v. Hall, 1 Humph. (Tenn.) 303; Brazelton v. Colyar, 2 Baxt. (Tenn.) 284; Twycross v. Dreyfus, L. R. 5 Ch. Div. 605, 23 Eng. Rep. 844; McCurdy v. Rogers, 21 Wis. 197, 91 Am. Dec. 468; Cutler v. Ashland, 121 Mass. 588; Comer v. Bankhead, 70 Ala. 493; Lyon v. Irish, 58 Mich. 518; Melchart v. Halsey, 3 Wils. 149; City of Providence v. Miller, 11 R. I. 272, 28 Am. Rep. 453; Perrin v. Lyman, 82 Ind. 16.

<sup>2</sup>Simonds v. Heard, 23 Pick. (Mass.) 120, 24 Am. Dec. 41; Cahokia v. Rautenberg, 83 Ill. 219; Fowler v. Atkinson, 6 Minn. 579; Wing v. Glick, 56 Iowa 473, 37 Am. Rep. 143, n; Baylis v. Pearson, 15 Iowa 279; Exchange Bank v. Lewis County, 28 W. Va. 278; Ross v. Brown, 74 Me. 352.

<sup>3</sup>In Hodgson v. Dexter, 1 Cranch (U. S.) 845.

<sup>4</sup>Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 534; Hodgson v. Dexter, 1 Cranch (U. S.) 845; Unwin v. Wolseley, 1 T. R. 674; Walker v. Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 834.

private principal would have been personally bound under like circumstances is not conclusive.

§ 808. But where Intent is clear they will be personally charged.—But, on the other hand, where such intent is clearly apparent, as where he uses apt words to charge himself personally, the public officer or agent will be held personally bound.<sup>1</sup>

Whether he is so bound or not becomes, therefore, largely a question of evidence, to be determined according to the facts and circumstances of each particular case.

It is, then, always admissible for the plaintiff to show, if he can, that though the defendant was a public officer, he yet in that particular case contracted as an individual.<sup>2</sup>

§ 809. Public Officer not ordinarily held to an implied Warranty of Authority.—“When public agents,” says EMMETT, C. J.,<sup>3</sup> “in good faith, contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves,<sup>4</sup> they do not become individually liable, unless the intent to incur a personal responsibility is clearly expressed, although it should be found that through ignorance of law they may have exceeded their authority. \* \* In this, as in other cases, the intention of the parties governs, and when a person, known to be a public officer, contracts with reference to the public matters committed to his charge, he is presumed to act in his official capacity only, although the contract may not in terms allude to the character in which he acts, unless the officer by unmistakable language assumes a personal lia-

<sup>1</sup> *Simonds v. Heard*, 23 Pick. (Mass.) 190, 34 Am. Dec. 41; *Cahokia v. Rautenberg*, 88 Ill. 219; *Fowler v. Atkinson*, 6 Minn. 579; *Wing v. Glick*, 56 Iowa 473, 37 Am. Rep. 142, n; *Bayliss v. Pearson*, 15 Iowa 279; *Exchange Bank v. Lewis County*, 28 W. Va. 273; *Ross v. Brown*, 74 Me. 353; *City of Providence v. Miller*, 11 R. I. 272, 23 Am. Rep. 453; *Sheffield v. Watson*, 3 Caines (N. Y.) 69; *Gill v. Brown*, 12 Johns. (N. Y.) 385; *Horsley v. Bell*, 1 Bro. C. C. 101.

<sup>2</sup> *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 439.

<sup>3</sup> In *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502. See to like effect: *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468; *New York, &c., Co. v. Harblson*, 16 Fed. Rep. 688; *Perry v. Hyde*, 10 Conn. 329; *Murray v. Carothers*, 1 Metc. (Ky.) 71.

<sup>4</sup> See also upon this point *Newman v. Sylvester*, 43 Ind. 113; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

bility<sup>1</sup> or is guilty of fraud or misrepresentation. Being a public agent with his powers and duties prescribed by law, the extent of his powers is presumed to be as well known to all with whom he contracts as to himself.<sup>2</sup> When, therefore, there is no want of good faith, a party contracts with such an officer with his eyes open, and has no one to blame if it should afterwards appear that the officer had not the authority which it was supposed he had."<sup>3</sup>

§ 810. But Officer may be bound by express Representation as to his Authority.—But the officer may undoubtedly be held liable to one who sustains injury thereby where, though in good faith but erroneously, he induces the making of the contract by express assertions, representations or warranties of his authority as a matter of fact,<sup>4</sup> as distinguished from matters of law,<sup>5</sup> of the falsity of which the other party did not and was not by law presumed to have knowledge.<sup>6</sup>

<sup>1</sup> See also *ante* § 806, and cases cited.

<sup>2</sup> Persons dealing with a public agent are charged with knowledge of the law conferring his authority. *Mayor of Baltimore v. Eschbach*, 18 Md. 288; *Mayor of Baltimore v. Reynolds*, 20 Md. 1, 88 Am. Dec. 535; *Lee v. Munroe*, 7 Cranch (U. S.) 366; *State v. Bank*, 45 Mo. 528; *State v. Hastings*, 10 Wis. 518; *Hull v. Marshall County*, 12 Iowa 142; *Silliman v. Fredericksburg, &c., R. R. Co.*, 27 Gratt. (Va.) 119; *The Floyd Acceptances*, 7 Wall. (U. S.) 680; *Clark v. Des Moines*, 19 Iowa 199, 87 Am. Dec. 423; *State v. Hays*, 52 Mo. 578; *Delafield v. State*, 26 Wend. (N. Y.) 192; *People v. Bank*, 24 Wend. (N. Y.) 481; *Whiteside v. United States*, 98 U. S. 247; *Newman v. Sylvester*, 42 Ind. 112.

<sup>3</sup> "If the party contracts as a public officer, and in that capacity acts honestly, he will not ordinarily be personally liable. *Belknap v. Reinhart*, 2 Wend. (N. Y.) 375, (20 Am.

Dec. 621); *Hodgson v. Dexter*, 1 Cranch (U. S.) 845; *Nichols v. Moody*, 23 Barb. (N. Y.) 611, and cases cited. If his authority to act is defined by public statute, all who contract with him will be presumed to know the extent of his authority, and cannot allege their ignorance as a ground for charging him with acting in excess of such authority, unless he knowingly misled the other party." *Newman v. Sylvester*, 42 Ind. 112.

<sup>4</sup> See *Mechem on Agency*, § 542; *Kroeger v. Pitcairn*, 101 Penn. St. 311, 47 Am. Rep. 718; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Jefts v. York*, 10 Cush. (Mass.) 392, 2 C. 4 Cush. 371, 50 Am. Dec. 791; *Bank of Hamburg v. Wray*, 4 Strob. (S. C.) 87, 51 Am. Dec. 659; *Belisle v. Clark*, 49 Ala. 98.

<sup>5</sup> See *Mechem on Agency*, §§ 545, 553. *Beattie v. Lord Ebury*, L. R. 7, Oh. App. 777, 8 Eng. Rep. 625.

<sup>6</sup> See *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 463.



§ 811. Or where he is guilty of Fraud or Misrepresentation.—*A fortiori* may the officer be held liable where he fraudulently or deceitfully conceals or misrepresents the facts in respect to his authority.<sup>1</sup>

§ 812. Officer may be Liable where knowing he has no Authority he makes Contract implying its Existence.—So the officer may be liable where, knowing that he has no authority, as where it was never conferred or has terminated, or depends upon the existence of extrinsic facts peculiarly within his own knowledge,<sup>2</sup> he yet, though without express assertions of authority, deals with the other party who has not and is not by law presumed to have knowledge of his authority,<sup>3</sup> as one possessing competent authority and without disclosing the lack of it, whereby the other party suffers injury.<sup>4</sup>

But the officer can not be held personally liable where the other party knew or had the means of knowing that the officer was unauthorized, unless the latter has expressly charged his personal responsibility.<sup>5</sup>

§ 813. Officer liable who disavows his official Character.—In *Freeman v. Otis*,<sup>6</sup> the court said that where a public agent makes a contract in the name and behalf of the government, the

<sup>1</sup> See *Mechem on Agency*, § 543, citing *Kroeger v. Pitcairn*, 101 Penn. St. 811, 47 Am. Rep. 718; *Smout v. Ilbery*, 10 Mees. & Wels. 1; *Bank of Hamburg v. Wray*, 4 Strob. (S. C.) 87, 51 Am. Dec. 659. See also *Newman v. Sylvester*, 43 Ind. 112; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468; *New York, &c., Co. v. Harbison*, 16 Fed. Rep. 688; *Perry v. Hyde*, 10 Conn. 329; *Murray v. Carothers*, 1 Metc. (Ky.) 71.

<sup>2</sup> *McClenticks v. Bryant*, 1 Mo. 598, 14 Am. Dec. 810. See also *McDonald v. Franklin County*, 2 Mo. 218; *Ruggles v. Washington County*, 3 Mo. 501.

<sup>3</sup> *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

<sup>4</sup> See *Mechem on Agency*, § 544.

<sup>5</sup> *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468; *Newman v. Sylvester*, 43 Ind. 106, 113. In the last case it is said: "It is material in such cases that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as fairly and fully put him upon inquiry for them, or the means of knowledge reasonably accessible to him, he cannot say he was misled, simply on the ground that the party assumed to act as agent without authority in the absence of fraud."

<sup>6</sup> *Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66. See also *Brown v. Austin*, 1 Mass. 208, 2 Am. Dec. 11.

agent is not liable to the action of the party contracted with, who must look to the government. But if such agent should deny to the government that he had entered into such contract, and by such interference prevents the party from availing himself of his remedy against the government, he must be personally liable, as he has, by his conduct, in effect disavowed his acting in the character of a public agent.

§ 814. **Officer Liable who conceals Fact of his Agency.**—So the officer would, like a private agent,<sup>1</sup> undoubtedly be held personally liable where he conceals the fact of his representative capacity, and contracts as the real principal.

§ 815. **Officer may be liable where there is no responsible Principal.**—So also, as in the case of a private agent,<sup>2</sup> the officer may be personally liable where he assumes to represent a principal which has no legal existence or status, or which has no legal responsibility.<sup>3</sup>

§ 816. **Where Officer is liable on the Contract made without Authority.**—Whether the officer can be held liable upon the very contract itself which he has, without authority, assumed to make, or whether the other party must find his relief in some other form of action, are questions upon which the authorities are not entirely in harmony. But the true rule seems to be that the officer can only be held liable upon the contract itself in those cases in which he has used apt words to bind himself, or has expressly pledged his personal responsibility, or in which the credit was given to him personally.<sup>4</sup>

§ 817. **How Liability enforced in other Cases.**—The liability of the officer can be enforced in other of such cases, if he be liable at all, only in an appropriate action based upon the express

<sup>1</sup> See this question fully discussed in *Mechem on Agency*, § 554.

<sup>2</sup> See *Mechem on Agency*, § 557.

<sup>3</sup> See *Blakely v. Bennecke*, 59 Mo. 193.

<sup>4</sup> *Ogden v. Raymond*, 23 Conn. 379, 58 Am. Dec. 439; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468. See also *Hall v. Orndall*, 29 Cal. 567, 89

Am. Dec. 64; *Duncan v. Niles*, 33 Ill. 532, 83 Am. Dec. 293; *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25; *Stetson v. Patten*, 3 Me. 358, 11 Am. Dec. 111; *Abbey v. Chase*, 6 Cush. (Mass.) 56; *McHenry v. Duffield*, 7 Blackf. (Ind.) 41.

See *Mechem on Agency*, § 550.

or implied warranty of authority,' or upon the fraud, misrepresentation or deceit.'

§ 818. *How when, though authorized, he fails to bind the Public.*—But there are still other cases in which the officer, being fully authorized to bind the public to the contract in question and intending in good faith to accomplish that result, may yet, through the failure to use appropriate language or to observe prescribed forms, entirely fail to make such a contract as is in law binding upon his principal. The question will then arise whether he is himself bound.

This question must be determined by reference to the same principles which have been already considered. It is, as has been seen, the constant presumption that the public officer does not intend to bind himself personally.<sup>3</sup> He can, as has also been seen, be held personally liable only where the intent to be so is clearly apparent.<sup>4</sup> The mere fact that he has failed to give a cause of action upon the contract against his principal does not necessarily lead to the result that he is himself bound.<sup>5</sup>

Guided by these principles then, it follows that he can in such a case be held personally liable upon the contract itself only when he has used apt words to charge himself personally, or when he has expressly pledged his personal responsibility, or when the credit was given to him individually.<sup>6</sup> In other cases the contract may bind no one at all, or may be utterly void, in which event the other party must seek his remedy, if he has any, either upon an implied contract based upon the original consideration, or upon some express or implied warranty of the sufficiency of the execution.<sup>7</sup>

<sup>3</sup> See *Baltzen v. Nicolay*, 53 N. Y. 467; *Patterson v. Lippincott*, 47 N. J. L. 457, 1 Atl. Rep. 506, 54 Am. Rep. 178.

<sup>4</sup> See *Noyes v. Loring*, 55 Me. 408.

<sup>5</sup> See *ante*, § 805.

<sup>6</sup> See *ante*, § 806.

<sup>7</sup> *Ogden v. Raymond*, 23 Conn. 379, 58 Am. Dec. 429; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468. See also *Dung v. Parker*, 53 N. Y.

494; *Baltzen v. Nicolay*, 53 N. Y. 467.

<sup>6</sup> *Ogden v. Raymond*, 23 Conn. 379, 58 Am. Dec. 429; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468; *Newman v. Sylvester*, 43 Ind. 112; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 503.

<sup>7</sup> See *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64.

## II.

## UPON CONTRACTS NOT NEGOTIABLE.

§ 819. Illustrations of Rule holding Officer not liable.—Illustrations of the rule that the public agent is not liable personally upon contracts made by him in behalf of the public, except where the contract evinces a clear intention that he should be so liable, are numerous.

Thus an instrument in writing beginning "For value received, we," A. S. C., W. M. C. and J. H. K., "members of the township committee of the township of Harrison, \* \* and our successors in office, promise to pay," etc.; authorizing any attorney-at-law appointed by the payee to prosecute suits "against us or our successors in office on said note" and to confess judgment for any sums in the payment of which "we or our successors in office may be delinquent," and signed with the individual names of the makers and sealed with their seals, is not binding upon the signers personally.<sup>1</sup>

So where a lease was made between H. of the one part and D., "secretary of war," of the other, whereby H. leased to D. "and his successors," and D. "for himself and his successors" covenanted to pay rent, etc., the lease being signed by H. and D. in their individual names, the Supreme Court of the United States held that D. was not personally liable upon his covenants.\*

An instrument reading "On settlement with Sylvanus Fox for work and labor on the court house in the village of Owego, we find there to be due him" a certain sum "which we promise to pay on the first day of June next," signed by D. and P. with the addition "Commissioners for building the court house at Owego Village," is not personally binding upon the signers.<sup>2</sup> And an instrument by which certain persons, "school directors of Heidelberg township" acknowledged themselves bound, and conditioned to be void if the persons named, "school directors of Heidelberg township \* \* and their successors in office \* \* shall pay," etc., signed in the individual names of the

<sup>1</sup> Knight v. Clark, 48 N. J. L. 23, 57 Am. Rep. 534.

<sup>2</sup> Hodgson v. Dexter, 1 Cranch (U. S.) 345.

<sup>3</sup> Fox v. Drake, 8 Cow. (N. Y.) 191.

makers, with their seals attached, binds the district and not the makers.<sup>1</sup>

An order addressed to J. F., "commissioner of common schools," in a certain district, directing the payment of a sum of money to a person named, and signed by two individuals with the addition "Trustees," does not make the signers personally liable.<sup>2</sup>

So an officer has been held not to be personally liable who has contracted "as superintendent of the State prison,"<sup>3</sup> or as "committee of the commissioners of roads."<sup>4</sup>

So an agreement between H. A. L. of the one part, and G. W. I. and M. C. "trustees of the village of Grand Ledge" by which the said G. W. I. and M. C. "trustees of the village of Grand Ledge" covenanted and agreed to pay H. A. L. a certain sum for building a bridge in the village, and which was signed H. A. L. (L. s.), G. W. I. "Trustee" (L. s.) M. C. (L. s.) is not binding upon the two latter personally.<sup>5</sup>

§ 820. **Cases holding Officer liable.**—But, on the other hand, where the committee of a town entered into a contract for the erection of a bridge, reciting that it was between H. H., E. S. and N. H. "committee of the town of Wayland" on the one part and S. and C., on the other, wherein among other things it was agreed that "said committee are to pay" said S. and C. a certain sum of money on completion of the work, and which was signed by the members of the committee in their individual names, the court held that it was apparent from the face of the contract that the committee intended to bind themselves and became personally responsible. The court, however, while recognizing the rule exempting public officers from personal liability, held that it had no application to this case, "it not being a contract in behalf of the public, but, at most, of a corporation capable of making contracts and liable to an action on its contracts."<sup>6</sup>

So where a contract was made between E. J. and W. parties

<sup>1</sup> Heidelberg School District v. Horst, 63 Penn. St. 301.

<sup>2</sup> Tutt v. Hobbs, 17 Mo. 486.

<sup>3</sup> Dawes v. Jackson, 9 Mass. 490.

<sup>4</sup> Miller v. Ford, 4 Rich. (S. C.) L. 376, 55 Am. Dec. 687.

<sup>5</sup> Lyon v. Irish, 58 Mich. 518.

<sup>6</sup> Simonds v. Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

of the first part, and D. "in behalf of the city of Providence" party of the other part, whereby the first parties agreed that, in consideration that the city would widen a certain street, they would convey to the second party a certain piece of land for a certain price, etc; the contract being signed and sealed by the parties in their individual names, it was held that the contract was personally obligatory upon D., and not upon the city of which he was the mayor.<sup>1</sup> The court recognized the rule usually applicable to public officers, but held that D. had chosen to become individually liable, saying, moreover, that it has been held "that the rule in regard to public officers does not apply in favor of the officers of a municipal corporation which is capable of making contracts for itself, and is liable to be sued thereon."<sup>2</sup>

### III.

#### UPON NEGOTIABLE INSTRUMENTS.

§ 821. *In general.*—When, however, the case of negotiable instruments is considered, other elements appear. Such paper is intended to serve as a means of commercial exchange and to largely take the place of money. It is, therefore, highly desirable that it should tell its own story and be unfettered and unlimited by any restrictions or exceptions not apparent upon its face. At the same time, there is nothing in this fact sufficient to override other established principles.

The cases dealing with this class of instruments are extremely conflicting. In many of them, the tendency of the courts has been to apply the same rules which govern the construction of similar instruments when made by a private agent, and to overlook or disregard the distinctions properly applicable in the case of public agents. Others, however, as will be seen, find no difficulty in applying to negotiable instruments the same rules and presumptions which govern in cases of non-negotiable contracts. Thus—

<sup>1</sup> *City of Providence v. Miller*, 11 R. I. 272, 23 Am. Rep. 453.

<sup>2</sup> As so holding, the court cites *Si-*

*monds v. Heard*, 28 Pick. 120, 84 Am. Dec. 41, (*supra*) and *Hall v. Cockrell*, 28 Ala. 507.

§ 822. **Cases applying Rule applicable to private Agency.**—Where a note reading “I promise to pay,” etc., was signed by G. H. and A. P. “School trustees,” it was held that the note was the individual obligation of the signers, and that the words “School trustees” were but descriptive of the persons;<sup>1</sup> and a similar ruling was made where the paper headed “State of Iowa, County of Jones, Township of Hale,” read “we agree to pay,” etc., and was signed W. H. G., “Pres. School Board,” and I. B. S. “Sec’y School Board.”<sup>2</sup> So where notes reading, “I promise,” etc., were signed J. B. “Agent for Lewis County,” it was held that J. B. was personally bound.<sup>3</sup> And a note reading “For valued received as treasurer of the town of Monmouth, I promise to pay,” etc., and signed W. G. B. “Treasurer,” was held to be the individual note of B.<sup>4</sup>

So individuals who promised “as committeemen for the erection of a school house in District No. 1,” but signed in their own names were held personally liable;<sup>5</sup> and where a note reading “For value received in policy No. 138,181, \* \* issued by the American Insurance Company \* \* we promise to pay to said Company,” etc., was signed E. G. “president.” J. A. C. “secretary,” and E. S. “director,” it was held that it was the individual note of the persons named.<sup>6</sup>

So again, where a note reading “For value received I promise to pay,” etc., “for causing full page view of the Leonard graded school building to be printed in the atlas of Clearfield County,”

<sup>1</sup> Village of Cahokia v. Rautenberg, 88 Ill. 219. To same effect, see Fowler v. Atkinson, 6 Minn. 579.

<sup>2</sup> Wing v. Glick, 56 Iowa 478, 37 Am. Rep. 142, note.

<sup>3</sup> Exchange Bank v. Lewis County, 28 W. Va. 273.

<sup>4</sup> Ross v. Brown, 74 Me. 352.

<sup>5</sup> Bayliss v. Pearson, 15 Iowa 279.

<sup>6</sup> American Ins. Co. v. Stratton, 59 Iowa 696.

These cases in Iowa must evidently be distinguished from certain others in the same State. Thus where a note reading “we, the undersigned, directors of school district No. 4, Montpelier township, promise to

pay,” &c., was signed by the individual names of the officers, it was held not binding on them personally. Bakers. Chables, 4 Greene (Iowa) 428. So, where a similar note reading “we, the board of school district No. 1” promise to pay, &c., was signed in the individual names. Lyon v. Adamson, 7 Iowa 509.

The court in these cases holds that, under the Code, the form adopted is the proper form in which to pledge the responsibility of the district. The same Code, however, provides a different name by which districts shall be known, and by which they shall make contracts, be sued, &c.

was signed J. T. L. "President Sch. Bd," which was found to mean President of the School Board, it was held that L. was personally bound.<sup>1</sup>

§ 823. *Cases distinguishing Public Officers.*— But, on the other hand, upon the ground that they were public officers, where two notes headed "Monticello, Ind.," and reading "we promise to pay," etc., were signed one H. P. A., W. S. H., C. W. K., "Trustees of Monticello School," and the other H. P. A., C. W. K., "School Trustees," it was held that the words "Trustees of Monticello School," and "School Trustees" were not mere *descriptio personarum*, but indicated an intent to charge the school town,<sup>2</sup> and the same ruling has been reaffirmed in later cases in the same State.<sup>3</sup> *A fortiori* did the same court apply this rule where a note reading "I promise to pay," etc., "to be paid out of the township funds," was signed F. K. M., "Trustee of Johnson Tp."<sup>4</sup>

Where a sealed note reading, we, A. S. C., W. M. C., and J. H. K., "members of the township committee of the township of Harrison, \* \* \* and our successors in office, promise to pay," was signed by the parties in their individual names, the court applied the doctrine in regard to public agents and held the signers not personally liable.<sup>5</sup>

Where a note reading "we, as trustees of school district No. 10," promise to pay, etc, was signed with the individual names of the makers, the court held that there could not well be any doubt that it was the promise of the district and not of the persons signing it, but that, if there was, it could be removed by showing the intention.<sup>6</sup>

<sup>1</sup> Forsey v. Caldwell—Penn.—9 Atl. Rep. 466.

<sup>2</sup> School Town of Monticello v. Kendall, 72 Ind. 91, 37 Am. Rep. 139.

<sup>3</sup> Moral School Tp. v. Harrison, 74 Ind. 93.

<sup>4</sup> Wallis v. Johnson School Tp. 75 Ind. 363. In this case the court said: "Where it appears that the consideration moved to the township, and it also further appears, from the whole instrument, that it was intended to

impose an obligation upon the township, there can be no doubt that the contract should be regarded as that of the corporation, and not as that of the officer whose name is signed to it," citing McKenzie v. Board, 72 Ind. 189; Sheffield School Tp. v. Address, 56 Ind. 157.

<sup>5</sup> Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 534.

<sup>6</sup> Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502.



§ 824. **Admissibility of parol Evidence to show Intent.**—Whether parol evidence may be resorted to to show the person intended to be bound is a question which, in the case of negotiable instruments executed by a private agent, has been much considered and upon which the courts are almost hopelessly in conflict. This question in that connection has been discussed with some fulness by the writer in another place.<sup>1</sup> In the case of public agents, however, the question has not frequently arisen.

In Iowa, where a note containing a promise, individual in form, was signed E. G., "President," J. A. O., "Secretary," and E. S., "Director," it was held that it was the individual promise of the persons named, and that parol evidence was not admissible in an action by the payee against the makers to show that it was given and accepted as the promise of the school district of which the signers were the respective officers indicated, and not as the individual promise of the signers.<sup>2</sup>

In Minnesota it was held, in accordance with the rule generally approved in cases of private agency, that where the paper is upon its face ambiguous as to the party to be charged, extrinsic evidence may be resorted to to show the real intention.<sup>3</sup>

The instrument in that case read, "we, as trustees of school district No. 10," promise, etc., and was signed with the individual names of the makers. The action was brought by the payee. The court considered it at least doubtful whether the note was an individual obligation.

In Missouri, the same rule prevails, and where a note reading "I promise to pay," etc., "for building a school-house in Dist. No. 3," was signed by P. T. R., "Local Director," it was held, in an action brought by the payee against the signer, that it was so far ambiguous that the director might show that it was intended to be the note of the district.<sup>4</sup>

See also *Baker v. Chambers*, 4 Greene (Iowa) 428, and *Lyon v. Adanson*, 7 Iowa 509, referred to a note to the preceding section.

<sup>1</sup> *Mechem on Agency*, § 441 *et seq.*

<sup>2</sup> *American Ins. Co. v. Stratton*, 59 Iowa 696, upon the authority of *Wing v. Glick*, 56 Iowa 478, 37 Am. Rep. 142, note.

<sup>3</sup> *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502. See also *Pratt v. Beaupre*, 18 Minn. 187.

<sup>4</sup> *McClellan v. Reynolds*, 49 Mo. 812. See also in Missouri, *Muser v. Johnson*, 42 Mo. 74, 97 Am. Dec. 316; *Shuetze v. Bailey*, 40 Mo. 69; *Washington Ins. Co. v. Seminary*, 52 Mo. 480; *Klosterman v. Loos*, 58 Mo. 290;

§ 825. **The true Rules.**—The adjudications upon many points of importance are yet so few as to render it impossible to construct from them a complete statement of the rules which govern in this relation.<sup>1</sup> The question is of importance, and the rules may well be different, in two classes of cases:—

1. Those between the original parties.
2. Those between the maker and a third party.

I. In the former class it is believed that the following rules are consonant with reason and with justice, and are not in conflict with the authorities:—

1. Where the paper on its face is clearly the direct and personal promise of the signer, no reference being made to an official character, the signer must be deemed to have intended to pledge his individual responsibility and must, therefore, be held personally bound. In such a case extrinsic evidence is not admissible to exonerate him.<sup>2</sup> So, where it is unmistakably the principal's promise, such evidence can not be resorted to to charge the agent.<sup>3</sup>

2. Where the instrument is ambiguous on its face, so as to render it doubtful as to the intention, the presumption of the law will be that a known public officer did not intend to charge himself personally, and extrinsic evidence may be introduced to clear up the ambiguity by showing the actual intention.<sup>4</sup>

3. In view of the presumption of the law against a personal obligation, a contract which, upon its face, bears some evidence of a representative capacity (as by the addition of the words "school trustees" and the like, and *a fortiori* so, where the name of the principal is also disclosed), is to be deemed at least ambiguous within the meaning of the preceding rule.<sup>5</sup>

Ferris v. Thaw, 5 Mo. App. 279; Turner v. Thomas, 10 Mo. App. 342.

<sup>1</sup> For the rules in case of a private agent, see Mechem on Agency, § 443.

<sup>2</sup> See Phelps v. Borland, 30 Hun (N. Y.) 362; Auburn Bank v. Leonard, 40 Barb. (N. Y.) 119; Babbett v. Young, 51 N. Y. 238; Hancock v. Fairfield, 30 Me. 299; Collins v. Buckeye State Ins. Co. 17 Ohio St. 215, 93 Am. Dec. 612; Brown v. Parker, 7 Allen (Mass.) 339.

<sup>3</sup> Falk v. Moebs, 127 U. S. 597.

<sup>4</sup> Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502; McClellan v. Reynolds, 49 Mo. 312.

<sup>5</sup> Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502; McClellan v. Reynolds, 49 Mo. 312.

The Indiana cases go further, and hold that the words "Trustees of Monticello School," "School Trustees," &c. are sufficient to show an intention to charge the township.

Where the paper discloses upon its face the name of a principal competent to make it, with such other words as indicate that the signer acted in a representative capacity, the paper is to be deemed that of the principal and not that of the agent.<sup>1</sup>

5. The fact that the instrument does not, either from lack of authority or of due execution, bind the principal, is not alone sufficient to charge the agent upon it.<sup>2</sup>

II. In the second class,—that of a third person against the maker,—the same rules should apply, except that extrinsic evidence ought to be admitted only in cases—

1. Where the third person is not a *bona fide* holder.

2. Where the instrument bears sufficient evidence upon its face, or is so ambiguous, as to fairly put a reasonably prudent man upon inquiry.<sup>3</sup>

*School Town of Monticello v. Kendall*, 73 Ind. 91, 37 Am. Rep. 139; *Moral School Tp. v. Harrison*, 74 Ind. 93; *Wallis v. Johnson School Tp.* 75 Ind. 368.

In New Jersey the cases also go further, and a promise, though under seal made by certain persons, "members of the township committee of the township of Harrison \* \* and our successors in office," is not the individual obligation of the signers, though they sign and seal as individuals: *Knight v. Clark*, 48 N. J. L. 22, 57 Am. Rep. 534.

The Iowa cases are *contra*: *American Ins. Co. v. Stratton*, 59 Iowa 696; *Wing v. Glick*, 56 Iowa 473.

<sup>1</sup> *Baker v. Chambles*, 4 Greene

(Iowa) 428; *Lyon v. Adamson*, 7 Iowa 509; *School Town of Monticello v. Kendall*, 73 Ind. 91, 37 Am. Rep. 139; *Moral School Tp. v. Harrison*, 74 Ind. 93; *Wallis v. Johnson School Tp.* 75 Ind. 368; *Knight v. Clark*, 48 N. J. L. 22, 57 Am. Rep. 534.

<sup>2</sup> *Ogden v. Raymond*, 23 Conn. 379, 58 Am. Dec. 429; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 463.

<sup>3</sup> *School Town of Monticello v. Kendall*, 73 Ind. 91, 37 Am. Rep. 139. In this case, where an indorsee was plaintiff, the court held the words "School Trustees" and "Trustees of Monticello School" affixed to the signature sufficient to show an intention to charge the school town.

## CHAPTER VIII

### OF THE LIABILITY OF THE PUBLIC FOR THE ACTS AND CONTRACTS OF ITS OFFICERS AND AGENTS.

§ 826. Purpose of this Chapter.

827. How Subject divided.

#### I. UPON CONTRACTS MADE BY OFFICER.

828. Authority is created by Law.

829. Persons dealing with Officer must ascertain his Authority.

830. Authority will be strictly construed.

831. Contract must be in Form prescribed by Law.

832. Limits fixed by Law must not be exceeded.

833. Conditions precedent must be complied with.

834. Public only bound while Officer keeps within his Authority.

835. Contract authorized and duly executed is binding.

836. State liable for Breach of binding Contract—Prospective Profits.

837. Estoppel of Government to deny Officer's Authority.

838. Ratification of unauthorized Acts and Contracts.

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840. To what Officers this Rule applies.

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841. Stricter Rule prevails than in private Agency.

842. Acts within the Scope of his Authority bind the Public.

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#### III. BY NOTICE TO THE OFFICER.

844. In private Agencies, Notice to Agent is Notice to Principal.

845. Same Rule applies to private Corporations.

846. Notice to the Officer, when Notice to the Public.

#### IV. FOR THE TORTS OF ITS OFFICERS.

847. In general.

##### 1. *The Liability of the United States.*

848. United States Government not liable for Torts of its Officers and Agents.

##### 2. *The Liability of States.*

849. State not liable for Torts of its Officers and Agents.

##### 3. *The Liability of Municipal Corporations.*

850. Municipal Corporation not liable for Torts of its Public Officers.

851. Same Subject—Illustrations of this Rule.

852. Municipal Corporations not liable for Acts done *ultra Vires*.

853. Municipal Corporation is liable for Torts of its Servants and Agents committed in execution of its Powers.

§ 826. **Purpose of this Chapter.**—Having heretofore considered the liability of the officer himself, attention may next be given to the liabilities imposed upon the public by his acts and contracts.

§ 827. **How Subject divided.**—This will involve a consideration of the liability of the public—1. For the officer's contracts; 2. For his declarations and admissions; 3. For notice to him; 4. For his torts.

## I.

### UPON CONTRACTS MADE BY OFFICERS.

§ 828. **Authority is created by Law.**—As has been seen,<sup>1</sup> the authority of every public officer to act in behalf of the public, is created by law, and unless so created and conferred it can not exist. Said Mr. Justice MILLER, in response to the inquiry, where are we to look for the authority of the office?: "The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law."<sup>2</sup>

§ 829. **Persons dealing with Officer must ascertain his Authority.**—Every person, therefore, who seeks to obtain, through the dealings with the officer, the obligation of the public, must, at his peril, ascertain that the proposed act is within the scope of the authority which the law has conferred upon the officer.<sup>3</sup>

<sup>1</sup> See *ante*, § 501.

<sup>2</sup> In *The Floyd Acceptances*, 7 Wall. (U. S.) 666, 676.

<sup>3</sup> *The Floyd Acceptances*, 7 Wall. (U. S.) 666; *Sutro v. Pettit*, 74 Cal. 382, 5 Am. St. Rep. 442; *McDonald*

§ 830. **Authority will be strictly construed.**—The authority of the officer being a matter of public record or of public law of which every person interested is bound to take notice, there is no hardship in confining the scope of the officer's authority within the limits of the express grant and necessary implication, and such is the well established rule.<sup>1</sup> There can be no occasion or excuse in such a case for indulging in presumptions or relying upon appearances, but the authority must be traced home to its source and must be shown actually to exist.<sup>2</sup> The fact, therefore, that the same act might have been within the scope of the authority if created by a private principal is not conclusive.<sup>3</sup>

§ 831. **Contract must be in Form prescribed by Law.**— So where the law expressly requires that the contract shall be executed in a certain manner or shall be in writing,<sup>4</sup> or shall be also

*v. Mayor*, 68 N. Y. 23, 23 Am. Rep. 144; *Barton v. Swepston*, 44 Ark. 437; *Dorsey County v. Whitehead*, 47 Ark. 205; *Merchants' Bank v. Bergen County*, 115 U. S. 384; *Wallace v. Mayor*, 29 Cal. 181; *Bloomington School Tp. v. National School Furnishing Co.* 107 Ind. 43; *Pine Township v. Huber*, 88 Ind. 121; *Axt v. Jackson School Tp.* 90 Ind. 101; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Union School Tp. v. First Nat. Bank*, 102 Ind. 464; *Summers v. Board*, 103 Ind. 262, 53 Am. Rep. 513; *Platter v. Board*, 108 Ind. 360; *Hodges v. Buffalo*, 2 Denio (N. Y.) 110; *Cornell v. Guilford*, 1 Denio (N. Y.) 510; *Savings Bank v. Winchester*, 8 Allen (Mass.) 109.

<sup>1</sup> *Mayor of Baltimore v. Eschbach*, 18 Md. 282; *Mayor of Baltimore v. Reynolds*, 20 Md. 1, 88 Am. Dec. 535; *Clark v. Des Moines*, 19 Iowa 199, 87 Am. Dec. 423; *The Floyd Acceptances*, 7 Wall. (U. S.) 666; *Lee v. Munroe*, 7 Cranch (U. S.) 866; *Whitely v. United States*, 98 U. S. 247; *State v. Bank*, 45 Mo. 528; *Curtis v. United States*, 2 N. & H. (U. S. Ct.

Cl.) 144; *Pierce v. United States*, 1 N. & H. 270; *Silliman v. Fredericksburg, &c. R. R. Co.* 27 Gratt. (Va.) 119; *State v. Hays*, 52 Mo. 578; *Delafield v. State*, 26 Wend. (N. Y.) 192; *Hull v. Marshall County*, 12 Iowa, 142.

<sup>2</sup> *State v. Bevers*, 86 N. C. 588.

<sup>3</sup> *Mayor of Baltimore v. Eschbach*, 18 Md. 282; *Mayor of Baltimore v. Reynolds*, 10 Md. 1, 88 Am. Dec. 535.

<sup>4</sup> Thus where the statute required contracts made by certain officers to be in writing and to be executed with prescribed formalities, a contract not so executed can not be enforced. Said Mr. Justice BRADLEY, of the United States Supreme Court: "It (the statute) makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of

approved by some other officer,<sup>1</sup> such requirement must be complied with or the contract will not be binding upon the government.

§ 832. **Limits fixed by Law must not be exceeded.** — So where the law authorizing the officer to act or contract fixes limits to his authority, his act or contract in excess of the limits fixed is not binding on his principal.<sup>2</sup> Here, as in other cases, the party dealing with him is bound, at his peril, to observe the limitations which the law prescribes.<sup>3</sup>

§ 833. **Conditions precedent must be complied with.** — So where the law authorizes the act or contract only in certain cases or at certain times, or upon certain conditions, as upon its approval by public vote or the determination by some other board or body of its necessity, or after advertising for bids, he who seeks to enforce the contract must see to it that the condition precedent has been complied with.<sup>4</sup>

§ 834. **Public only bound while Officer keeps within his Authority.**—It is a necessary conclusion from the principles already stated that the public, whether it be the national, state or lesser municipal government, can be bound by the acts and contracts of its officers and agents only when such officer or agent has acted strictly within the scope of his authority as created, conferred and defined by law, and that it is not bound where

opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit, and returning a copy of the contract to the proper office, the party is not responsible for this neglect." *Clark v. United States*, 95 U. S. 539, 542. See also *Camp v. United States*, 113 U. S. 648. But see *Salomon v. United States*, 19 Wall. (U. S.) 17.

<sup>1</sup> Thus see *Parish v. United States*, 8 Wall. (U. S.) 489; *Filor v. United States*, 9 Wall. 45; *McDonald v.*

*Mayor*, 68 N. Y. 23, 23 Am. Rep. 144.

<sup>2</sup> *Daviess County v. Dickinson*, 117 U. S. 657; *Merchants' Bank v. Bergen County*, 115 U. S. 384; *Sutro v. Pettit*, 74 Cal. 332, 5 Am. St. Rep. 442.

<sup>3</sup> *Sutro v. Pettit*, 74 Cal. 332, 5 Am. St. Rep. 442; *Wallace v. Mayor*, 29 Cal. 181; *Merchants' Bank v. Bergen County*, 115 U. S. 384.

<sup>4</sup> *Fluty v. School District*, 49 Ark. 94; *McClure v. Oxford*, 94 U. S. 439; *Toledo Bank v. Trustees*, 110 U. S. 608; *Carroll County v. Smith*, 111 U. S. 556; *Dixon County v. Field*, 111 U. S. 83; *McDonald v. Mayor*, 68 N. Y. 23, 23 Am. Rep. 144.

such officer or agent has transcended or exceeded his lawful and legitimate powers.<sup>1</sup>

<sup>1</sup> The Floyd Acceptances, 7 Wall. (U. S.) 666; Whiteside v. United States, 28 U. S. 247; Mayor of Baltimore v. Reynolds, 20 Md. 1, 38 Am. Dec. 535; State v. Bevers, 86 N. C. 588; Newberry v. Fox, 37 Minn. 141, 5 Am. St. Rep. 880, 33 N. W. Rep. 338; Mayor v. Ray, 19 Wall. (U. S.) 468; Brady v. Mayor, 20 N. Y. 812; Hague v. Philadelphia, 48 Penn. St. 527; Nash v. St. Paul, 8 Minn. 172.

Speaking in a case against a municipal corporation, Clark v. City of Des Moines, 19 Iowa 199, 87 Am. Dec. 423, DILLON, J. said: "The general principle of law is well known and definitely settled, that the agents, officers, or even city council of a municipal corporation, can not bind the corporation when they transcend their lawful and legitimate powers.

This doctrine rests upon this reasonable ground: The body corporate is constituted of all of the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Every one, therefore, may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule, that the corporation is bound only when its agents, by whom, from the very necessities of its being, it must act, if it acts at all, keep within the limits of their authority.

Not only so, but such a corporation may successfully interpose the plea of *ultra vires*; that is, set up as a

defense its own want of power, under its charter or constituent statute, to enter into a given contract or to do a given act in violation or excess of its corporate power and authority.

The cases asserting these principles are numerous and uniform; some of the more important and striking ones need only be cited:

Mayor of Albany v. Ounliff (city not liable for negligently building bridge under an unconstitutional statute) 2 N. Y. 165 (1849), reversing *s.c.* 2 Barb. 199; Cuyler v. Trustees of Rochester (laying out street contrary to charter), 12 Wend. (N. Y.) 165 (1834); Hodges v. Buffalo (4th of July appropriation) 2 Denio 110 (1846); Halstead v. Mayor, 3 N. Y. 430 (1850); Martin v. Mayor, 1 Hill 545; Boom v. Utica, 2 Barb. 104; Cornell v. Guilford, 1 Denio 510; Boyland v. Mayor and Aldermen of New York, 1 Sand. 27 (1847); Dill v. Wareham, 7 Metc. 433 (1844); Vincent v. Nantucket, 12 Oush. 103, 105 (1853), per MERRICK, J.; Stetson v. Kempton, 18 Mass. 272, 7 Am. Dec. 145; Parsons v. Inhabitants of Goshen, 11 Pick. 396; Hood v. Inhabitants of Lynn, 1 Allen. 103 (1861); Spalding v. Lowell, 23 Pick. 71; Mitchell v. Rockland, 41 Me. 363, (1858) *s. c.* 41 Me. 363, 66 Am. Dec. 252; Anthony v. Adams, 1 Met. 284 (1840); Western College v. Cleveland, 12 Ohio St. 375 (1861); Commissioners v. Cox, 6 Ind. 403 (1855); Inhabitants v. Weir, 9 Ind. 224 (1857); Smead v. Indianapolis, &c. R. R. Co. 11 Ind. 104 (1858); Brady v. Mayor, 20 N. Y. 812; Appleby v. Mayor, 15 How. Pr. 428; Estep v. Keokuk County, 18 Iowa 199, and cases cited by COLM. J.; Clark v. Polk County, 19 Iowa 247."



§ 835. **Contract authorized and duly executed is binding.—How construed.** —But a contract fully authorized and duly executed is as binding upon the public as upon the private principal. Said ALLEN, J., of the New York Court of Appeals: "The State, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject; but, when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and snitor. The State is not in tutelage, as one incapable of acting *sui juris*, but has capacity to act in all matters by its representatives and agents, and is bound by the acts and admissions of its duly appointed and recognized officers and representatives, acting within the general scope of their constitutional powers, whether ministerial or executive. In the absence of fraud or collusion, the acts of public officers, within the limits of the authority conferred upon them, and in the performance of the duties assigned them in dealing with third persons, are the acts of the State, and can not be repudiated. Neither can the State allege infancy, incompetency or disability to avoid the effects of the official acts of its agents. This is of

A State officer can only deal or contract in relation to the property of the State when he is authorized so to do by the express provisions of law; and any agreement he may make, or attempt to make, in relation to such property, when he is not so authorized is void as against the State. *McCaslin v. State*, 99 Ind. 423, 440.

See also *State v. Hastings*, 12 Wis. 596; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Yancey v. Hopkins*, 1 Munf. (Va.) 419.

See also *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *East Oakland v. Skinner*, 94 U. S. 255; *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Kendall County*, 105 U. S. 667; *Lewis v. Shreveport*, 108 U. S. 282; *Hayes v. Holly Springs*, 114 U. S. 120; *Bates County v. Winters*, 97 U. S. 83; *Harshman v. Bates County*, 93 U. S. 569; *McClure v. Oxford Tp.* 94 U. S. 429.

necessity; for, as the State can only act by its duly constituted authorities, there would be no safety in dealing with the State, if it were otherwise, and each succeeding official could repudiate the acts, avoid the contracts, rescind settlements and reclaim payments.”<sup>1</sup>

§ 836. **State liable for Breach of binding Contract—Prospective Profits.**—Where the State has thus become bound by a duly executed contract, it incurs the same liability for its breach as a private individual. And this liability includes a liability for prospective profits when it has arrested the performance of its lawful contracts to the same extent that private individuals could be held liable for such profits.<sup>2</sup>

But a suit against the State cannot be maintained without its own consent,<sup>3</sup> and this limitation can not be evaded by bringing the action against a State officer based upon what is in reality the obligation of the State.<sup>4</sup>

§ 837. **Estoppel of Government to deny Officer's Authority.**—“The government,” says Mr. BISHOP,<sup>5</sup> “is never estopped, as an individual or private corporation may be, on the ground that the agent is acting under an apparent authority which is not real; the conclusive presumption that his powers are known rendering such a consequence impossible. So that the government is bound only when there is an actual authorization.”<sup>6</sup>

But while the State may thus not be estopped,<sup>7</sup> it is clear that the lesser municipal corporations, such as counties, townships and cities may by their conduct, as by holding the officer out to the public as fully competent,<sup>8</sup> or by expressly or tacitly recognizing

<sup>1</sup> *People v. Stephens*, 71 N. Y. 537, 549; *Danolds v. State*, 89 N. Y. 36, 43 Am. Rep. 277.

<sup>2</sup> *Danolds v. State*, 89 N. Y. 36, 43 Am. Rep. 277.

<sup>3</sup> *Railroad Company v. Tennessee*, 101 U. S. 337; *Board of Liquidation v. McComb*, 93 U. S. 531.

<sup>4</sup> *Hagood v. Southern*, 117 U. S. 52; *Louisiana v. Jumel*, 107 U. S. 711; *In re Ayers*, 123 U. S. 443.

<sup>5</sup> *Bishop on Contracts*, § 993.

<sup>6</sup> *Citing State v. Bevers*, 86 N. C.

588; *State v. Hastings*, 10 Wis. 518; *Mayor of Baltimore v. Eschbach*, 18 Md. 232; *Woodward v. Campbell*, 39 Ark. 530; *Mayor of Baltimore v. Reynolds*, 20 Md. 1, 38 Am. Dec. 535.

<sup>7</sup> See also *Pulaski v. State*, 42 Ark. 118; *Attorney-General v. Marr*, 55 Mich. 445; *State v. Brewer*, 64 Ala. 287.

<sup>8</sup> *Davies v. Mayor*, 98 N. Y. 250; *Cook County v. Harms*, 108 Ill. 151; *Sexton v. Chicago*, 107 Ill. 823; *Chi.*

his acts when, if unauthorized, they should have repudiated them,' estop themselves from denying the authority to one who, in good faith, has put value in jeopardy in reasonable reliance upon their conduct.'

§ 838. **Ratification of unauthorized Acts and Contracts.**—The subject of the ratification of the unauthorized acts or contracts of public officers has already been considered at some length in earlier sections of this work.\* It was there seen, to recapitulate, that authority for the doing of a lawful act, or the making of a lawful contract, can not only be conferred by previous authorization, but a retrospective authority may also be conferred by a subsequent ratification. For it is a principle applicable to States and lesser municipal governments and agencies, as well as to private principals,<sup>4</sup> that whatever the principal might originally and could still lawfully do himself, and might then and could still lawfully delegate to an agent, he may subsequently, when done in his name and on his behalf, lawfully ratify and adopt with the same effect as though it had been properly done under a previous authorization.<sup>5</sup>

But here, as in the case of the private principal, it must appear,—except in those cases where the principal intentionally assumes the risk without inquiry,<sup>6</sup> or deliberately ratifies having all the knowledge in respect to the transaction which he cares to

*cago v. Railroad Co.* 105 Ill. 85; *Chicago v. McGraw*, 75 Ill. 570.

<sup>1</sup> See various cases of estoppel arising from recitals in municipal bonds; *Colomba v. Eaves*, 92 U. S. 484; *Douglas County v. Bolles*, 94 U. S. 104; *Marion County v. Clark*, 94 U. S. 278; *Henry County v. Nicolay*, 95 U. S. 619; *Rock Creek Tp. v. Strong*, 96 U. S. 271; *San Antonio v. Me-haffy*, 96 U. S. 812; *Warren County v. Marcy*, 97 U. S. 96; *Nauvoo v. Ritter*, 97 U. S. 389; *Calhoun County v. Galbraith*, 99 U. S. 214; *Orleans v. Platt*, 99 U. S. 676; *Lyons v. Munson*, 99 U. S. 684; *Walnut v. Wade*, 103 U. S. 688; *Clay County v. Savings Society*, 104 U. S. 579; *Sherman County v. Simons*, 109 U. S. 785; *Gre-*

*nada County v. Brogden*, 112 U. S. 261.

<sup>2</sup> See also *Beers v. Dallas City*, — Oreg. — 18 Pac. Rep. 835.

<sup>3</sup> See *ante*, §§ 526—564.

<sup>4</sup> As to ratification by private principal see *Mechem on Agency*, Book I., Chap. V.

<sup>5</sup> *State v. Torinus*, 26 Minn. 1, 37 Am. Rep. 395; *Sullivan v. School District*, 89 Kans. 347, 18 Pac. Rep. 287; *Duke v. Williamsburg*, 21 S. C. 414; *People v. Stephens*, 71 N. Y. 527.

<sup>6</sup> *Lewis v. Read*, 18 Mees. & Wels. 884; *Phosphate of Lime Co. v. Green*, L. R. 7 Q. P. 43, 1 Eng. Rep. 96; *Mechem on Agency*, §§ 128—129.

have,<sup>1</sup>—that the adoption and ratification were made by him with a full knowledge of all of the material facts connected with the transaction, and especially that the existence of the contract and its nature and consideration were known to him.<sup>2</sup> It is not necessary, however, that he should also be informed of the legal effect of the facts.<sup>3</sup> But if the material facts were suppressed, or were unknown to him, except as the result of his intentional and deliberate act, the ratification will be invalid because founded upon mistake or fraud.<sup>4</sup>

So, here, as in other cases, the whole act must be ratified or none of it. The principal can not take the benefits and reject the burdens.<sup>5</sup>

Ratification by the public, unlike that by the private individual, must, from the very nature of the case, be effected through other agents or officers. For while an agent cannot ratify his own unauthorized act,<sup>6</sup> nor one of two joint agents ratify the act of his co-agent,<sup>7</sup> yet where the act, which, when done by one agent is unauthorized, is within the general power of another agent of the same principal, the doing of the act by the first agent may be ratified by the second.<sup>8</sup> But in order to

<sup>1</sup> Kelley v. Newburyport Horse R. Co. 141 Mass. 496. Mechem on Agency, §§ 128, 129.

<sup>2</sup> Mechem on Agency, § 129; Wheeler v. Northwestern Sleigh Co. 89 Fed. Rep. 847.

<sup>3</sup> Kelley v. Newburyport Horse R. Co. 141 Mass. 496; Roberts v. Rumley, 58 Iowa 301; Combs v. Scott, 13 Allen (Mass.) 498; Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43, 1 Eng. Rep. 98.

<sup>4</sup> Bank of Owensboro v. Western Bank, 13 Bush (Ky.) 526, 26 Am. Rep. 311; Wheeler v. Northwestern Sleigh Co., 87 Fed. Rep. 347; Hoffman v. Livingston, 46 N. Y. Super. 552; Miller v. Board of Education, 44 Cal. 166; Dean v. Bassett, 57 Cal. 640; Adams Express Co. v. Trego, 35 Md. 47.

<sup>5</sup> Mechem on Agency, § 130; McClure v. Briggs, 58 Vt. 82, 56 Am.

Rep. 557; Eberts v. Selover, 44 Mich. 519, 38 Am. Rep. 278; Rudasill v. Falls, 92 N. C. 232; Tasker v. Kenton Ins. Co., 59 N. H. 438; Barhydt v. Clark, 12 Ill. Ap. 646; Southern Express Co. v. Palmer, 48 Ga. 85; Kridder v. Western College, 31 Iowa 547; Ruffner v. Hewitt, 7 W. Va. 535; Mercier v. Copelan, 73 Ga. 636; Henderson v. Cummings, 44 Ill. 335.

<sup>6</sup> Mechem on Agency, § 121; Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Hotchin v. Kent, 8 Mich. 526.

<sup>7</sup> Mechem on Agency, § 121; Penn v. Evans, 28 La. Ann. 576.

<sup>8</sup> Mechem on Agency, § 121; Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 N. W. Rep. 808; Cairo, &c., R. R. Co. v. Mahoney, 83 Ill. 73, 25 Am. Rep. 299; Toledo, &c., R. R. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484; Toledo, &c., R. R. Co. v. Prince,

effect this ratification, it must appear (1) that the act is one which the principal himself could lawfully do or delegate;<sup>1</sup> (2) that the agent ratifying must have had general power to himself do the act which he ratifies;<sup>2</sup> and (3) that they were both agents of the same principal and that the agent whose act is ratified must have professed to act as agent of the common principal.<sup>3</sup>

§ 839. **Officer can not deal with himself without Principal's Knowledge and Consent.**—It is a rule of universal application in the law governing the dealings between principals and agents, both public and private,<sup>4</sup> that the agent shall not be permitted, in the course of the execution of his agency, to put himself in such a position that his own interests shall be antagonistic to those of his principal. By accepting the undertaking he impliedly agrees, and it becomes his duty, to use all his endeavors for the benefit and advantage of his principal, to whom belong all the profits, increase and advantages which may result from its execution. This duty can not be performed if the agent is to be permitted to take advantage of his position and its opportunities to make gain for himself. Public policy, therefore, demands and the law declares, that, except with the full knowledge and consent of his principal, the agent shall not in the execution of his trust deal with or for himself, whether directly or indirectly.<sup>5</sup>

Without such knowledge and consent, therefore, an agent if

50 Ill. 26; Ballston Spa Bank v. Marine Bank, 16 Wis. 129; Anglo-Californian Bank v. Mahoney Mining Co., 5 Sawy. (U. S. C. C.) 255, s. c. 104 U. S. 192; Sherman v. Fitch, 98 Mass. 59; Walworth Bk. v. Farmers' L. & T. Co., 16 Wis. 629; Hoyt v. Thompson, 19 N. Y. 207; Darst v. Gale, 83 Ill. 186; First Nat. Bank v. Kimberlands, 16 W. Va. 555; Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Wood v. Whelen, 93 Ill. 155; Chouteau v. Allen, 70 Mo. 290; Reichwald v. Commercial Hotel Co. 106 Ill. 439; Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315; Olcott v. Tioga R. R. Co. 27 N. Y. 546, 84 Am. Dec. 298; Union Mutual L.

Ins. Co. v. Masten, 3 Fed. Rep. 881.

<sup>1</sup> Mechem on Agency, § 111.

<sup>2</sup> Mechem on Agency, § 121; Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 N. W. Rep. 808.

<sup>3</sup> Mechem on Agency, § 121, 127; Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 N. W. Rep. 808.

<sup>4</sup> See the whole subject discussed in Mechem on Agency, §§ 454-473.

<sup>5</sup> See People v. Township Board, 11 Mich. 223; Tisdale v. Tisdale, 3 Sneed (Tenn.) 596, 64 Am. Dec. 775; Switzer v. Skiles, 3 Gilm. (Ill.) 529, 44 Am. Dec. 723; Bunker v. Miles, 30 Me. 431, 50 Am. Dec. 633; Miller v. Davidson, 3 Gilm. (Ill.) 518, 44 Am. Dec. 715.

authorized to sell or lease property for his principal can not sell or lease it to himself;<sup>1</sup> or, if authorized to purchase or lease can not purchase or lease it of<sup>2</sup> or for<sup>3</sup> himself; or, if authorized to

<sup>1</sup> *People v. Township Board*, 11 Mich. 232; *Olute v. Barron*, 2 Mich. 194; *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130; *Moore v. Mandlebaum*, 8 Mich. 433; *Powell v. Conant*, 33 Mich. 396; *Merryman v. David*, 31 Ill. 404; *Kerfoot v. Hyman*, 53 Ill. 512; *Cottom v. Holliday*, 59 Ill. 176; *Mason v. Bauman*, 62 Ill. 76; *Stone v. Daggett*, 78 Ill. 367; *Tewksbury v. Spruance*, 75 Ill. 187; *Hughes v. Washington*, 72 Ill. 84; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Bain v. Brown*, 56 N. Y. 235; *Tynes v. Grimstead*, 1 Tenn. Ch. 508; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Copeland v. Mercantile Ins. Co.* 6 Pick. (Mass.) 198; *Parker v. Vose*, 45 Me. 54; *White v. Ward*, 26 Ark. 445; *Stewart v. Mather*, 32 Wis. 344; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Scott v. Mann* 36 Tex. 157; *Francis v. Kerker*, 85 Ill. 190; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Robertson v. Western F. & M. Ins. Co.* 19 La. 237, 36 Am. Dec. 673; *Florance v. Adams*, 2 Rob. (La.) 556, 38 Am. Dec. 226; *Butcher v. Krauth*, 14 Bush. (Ky.) 713; *Moseley v. Buck*, 3 Munf. (Va.) 232, 5 Am. Dec. 508; *McKinley v. Irvine*, 18 Ala. 681; *Banks v. Judah*, 8 Conn. 145; *Church v. Sterling*, 16 Conn. 888; *Sturdevant v. Pike*, 1 Ind. 277; *Matthews v. Light*, 32 Me. 305; *Moore v. Moore*, 5 N. Y. 256; *Shannon v. Marmaduke*, 14 Tex. 217; *Segar v. Edwards*, 11 Leigh (Va.) 213.

<sup>2</sup> *Taussig v. Hart*, 58 N. Y. 425; *Tewksbury v. Spruance*, 75 Ill. 187; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Florance v. Adams*, 2 Rob. (La.) 556, 38 Am. Dec. 226; *Ely*

*v. Hanford*, 65 Ill. 267; *Conkey v. Bond*, 36 N. Y. 427; *Beal v. McKiernan*, 6 La. (O. S.) 407; *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600.

<sup>3</sup> *Kraemer v. Deustermann*, 37 Minn. 469, 35 N. W. Rep. 276; *Rose v. Hayden*, 35 Kans. 106, 57 Am. Rep. 145; *Van Horne v. Fonda*, 5 Johns. (N. Y.) Ch. 388; *Sweet v. Jacobs*, 6 Paige (N. Y.) 855, 31 Am. Dec. 252; *Pinnock v. Clough*, 16 Vt. 500, 43 Am. Dec. 521; *Dennis v. McCagg*, 32 Ill. 444; *Hitchcock v. Watson*, 18 Ill. 289; *McMurray v. Mobley*, 39 Ark. 309; *Ringo v. Binns*, 10 Pet. (U. S.) 269; *Wolford v. Herrington*, 74 Penn. St. 311, 15 Am. Rep. 543; *Van Hurter v. Spengeman*, 17 N. J. Eq. 165; *Van Epps v. Van Epps*, 9 Paige (N. Y.) 237; *Torrey v. Bank of Orleans*, 9 Paige 649; *Eshleman v. Lewis*, 49 Penn. St. 410; *Smith v. Brotherline*, 63 Penn. St. 461; *Krutz v. Fisher*, 8 Kans. 90; *Fisher v. Krutz*, 9 Kans. 501; *Winn v. Dillon*, 27 Miss. 494; *Wellford v. Chancellor*, 5 Gratt. (Va.) 39; *Church v. Sterling*, 16 Conn. 888; *Rhea v. Puryear*, 26 Ark. 344; *Matthews v. Light*, 32 Me. 305; *McMahon v. McGraw*, 26 Wis. 615; *Barziza v. Story*, 39 Tex. 354; *Chastian v. Smith*, 30 Ga. 96; *Cameron v. Lewis*, 56 Miss. 76; *Gillenwaters v. Miller*, 49 Miss. 150; *Sanford v. Norris*, 4 Abb. App. Dec. (N. Y.) 144; *Parkist v. Alexander*, 1 Johns. (N. Y.) Ch. 394; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640; *Burrell v. Bull*, 3 Sandf. (N. Y.) Ch. 15; *Bennett v. Austin*, 31 N. Y. 308; *Hargrave v. King*, 5 Ired. (N. C.) Eq. 430; *Kendall v. Mann*, 11 Allen (Mass.) 15; *Jackson v. Stevens*, 106

let or grant rights or contracts, can not let or grant them to himself;<sup>1</sup> or, if authorized to settle claims against his principal, can not buy them in himself and enforce them as his own.<sup>2</sup> Neither will he be permitted to make profit or advantage for himself based upon his own neglect or default,<sup>3</sup> as by purchasing at a tax sale lands upon which it was his duty to pay the taxes and the payment of which would have prevented the sale.<sup>4</sup>

If the agent or officer violates this rule, the principal may, at his option, repudiate the transaction and recover whatever he has parted with,<sup>5</sup> and may, if the agent has purchased in his own name or derived profits lawfully belonging to the principal, compel the agent to convey or account for the same;<sup>6</sup> or, he may affirm the transaction and enforce it against the officer or agent, as though originally authorized.

The right of the principal to disaffirm the transaction exists irrespective of the agent's motive or the fairness of the contract. If he elects to repudiate it he may do so, notwithstanding

Mass. 94; McDonough v. O'Neil, 113 Mass. 92; Sandfoss v. Jones, 85 Cal. 481; Snyder v. Walford, 38 Minn. 175; Soggins v. Heard, 31 Miss. 426; Sechrist's Appeal, 66 Penn. St. 287; Peebles v. Reading, 8 Serg. & R. (Penn.) 484; Onson v. Cown, 22 Wis. 329; Bryant v. Hendricks, 5 Iowa 256; Judd v. Moseley, 30 Iowa 424; Jenkins v. Eldredge, 8 Story (U. S. C. C.) 183; Baker v. Whiting, 3 Sumner (U. S. C. C.) 476; Rothwell v. Dewees, 2 Black (U. S.) 618.

For lease cases, see Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Vallette v. Tedens, 123 Ill. 607, 8 Am. St. Rep. 502; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304.

<sup>1</sup> Flint, &c., R. R. Co. v. Dewey, 14 Mich. 477; Pickett v. School District, 25 Wis. 551, 3 Am. Rep. 105; Currie v. School District, 35 Minn. 163, 27 N. W. Rep. 922.

<sup>2</sup> Davis v. Smith, 48 Vt. 269; Case v. Carroll, 35 N. Y. 385; Noyes v. Landon, 59 Vt. 569; 10 Atl. Rep. 342;

Albertson v. Fellows, — N. J. —, 17 Atl. Rep. 816; Reed v. Norria, 2 Myl. & C. 361; Smith v. Brotherline, 62 Penn. St. 461.

<sup>3</sup> Adams v. Sayre, 70 Ala. 318.

<sup>4</sup> Bowman v. Officer, 53 Iowa 640; Ellsworth v. Cordrey, 63 Iowa 675; Collins v. Rainey, 42 Ark. 531; Woodman v. Davis, 32 Kans. 344; Curtis v. Cisna, 7 Blas. (U. S. C. C.) 260; Franks v. Morris, 9 W. Va. 664; Barton v. Moss, 32 Ill. 50; Oldhams v. Jones, 5 B. Mon. (Ky.) 458; Krutz v. Fisher, 8 Kans. 90; Mathews v. Light, 32 Me. 305; Huzzard v. Trego, 35 Penn. St. 9; Bartholomew v. Leech, 7 Watts. (Penn.) 473.

<sup>5</sup> Louisville Bank v. Gray, 84 Ky. 565; People v. Township Board, 11 Mich. 222; Currie v. School District, 35 Minn. 163, 27 N. W. Rep. 922; Pickett v. School District, 35 Wis. 551, 3 Am. Rep. 105.

<sup>6</sup> Rose v. Hayden, 35 Kans. 106, 57 Am. Rep. 145, and cases cited in note 3, p. 563.

ing that the agent may have acted in the best of faith, or that the transaction as entered into may appear to be for the principal's advantage.<sup>1</sup>

What the agent or officer can thus not do directly he will not be permitted to do indirectly, as by dealing in the name of another but for his own benefit. The law looks behind the appearance to the reality, and holds it voidable at the principal's election.<sup>2</sup>

§ 840. To what Officers this Rule applies.— This rule is of constant application to the case of private agents,<sup>3</sup> but it applies also to public or *quasi*-public officers, such as administrators,<sup>4</sup> executors,<sup>5</sup> guardians,<sup>6</sup> sheriffs,<sup>7</sup> deputy-sheriffs,<sup>8</sup> trustees,<sup>9</sup> assignees,<sup>10</sup> commissioners in bankruptcy,<sup>11</sup> judges of probate,<sup>12</sup>

<sup>1</sup> *Tausig v. Hart*, 58 N. Y. 425; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *People v. Township Board*, 11 Mich. 223; *Currie v. School District*, 35 Minn. 163, 27 N. W. Rep. 923; *Flagg v. Manhattan Ry.* 10 Fed. Rep. 413; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505; *Smith v. Albany*, 61 N. Y. 444; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Wardell v. Railroad Co.* 103 U. S. 651.

<sup>2</sup> *Cameron v. Lewis*, 56 Miss. 76; *Eldridge v. Walker*, 60 Ill. 230; *Hughes v. Washington*, 72 Ill. 84; *Rogers v. Rogers*, 1 Hopk. (N. Y.) 524; *Kruse v. Steffens*, 47 Ill. 112; *Forbes v. Halsey*, 26 N. Y. 53; *Davoue v. Fanning*, 2 Johns. (N. Y.) Ch. 257; *Beaubien v. Poupard*, Harr. (Mich.) Ch. 206.

<sup>3</sup> See *Mechem on Agency*, §§ 454-472.

<sup>4</sup> *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130; *Pearson v. Moreland*, 7 Smedes & M. (Miss.) 609, 45 Am. Dec. 819; *Scott v. Freeland*, 7 Smedes & M. (Miss.) 409, 45 Am. Dec. 810; *Planters' Bank v. Neely*, 7 How. (Miss.) 80, 40 Am. Dec. 51; *McGowan*

*v. McGowan*, 48 Miss. 553; *Hoffman v. Harrington*, 28 Mich. 106; *Obert v. Hammel*, 3 Har. (N. J.) 74; *Coat v. Coat*, 63 Ill. 78; *Kruse v. Steffens*, 47 Ill. 112; *Smith v. Drake*, 23 N. J. Eq. 302.

<sup>5</sup> *Rogers v. Rogers*, 1 Hopk. (N. Y.) 524; *Schenck v. Dart*, 23 N. Y. 420; *Winter v. Geroe*, 5 N. J. Eq. 819; *Dunlap v. Mitchell*, 10 Ohio 117; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Scott v. Gorton*, 14 La. 115, 38 Am. Dec. 578.

<sup>6</sup> *Ward v. Smith*, 3 Sandf. (N. Y.) Ch. 592.

<sup>7</sup> *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Carr v. Houser*, 46 Ga. 477; *Flury v. Grimes*, 52 Ga. 848; *Mayor of Macon v. Huff*, 60 Ga. 228.

<sup>8</sup> *Perkins v. Thompson*, 3 N. H. 144.

<sup>9</sup> *Robertson v. Western F. & M. Ins. Co.* 19 La. 237, 36 Am. Dec. 673; *Green v. Winter*, 1 Johns. (N. Y.) Ch. 26; *Davoue v. Fanning*, 2 Johns. (N. Y.) Ch. 257.

<sup>10</sup> *Ex parte Lacey*, 6 Ves. Jr. 628.

<sup>11</sup> *Ex parte Bennett*, 10 Ves. Jr. 384.

<sup>12</sup> *Walton v. Torrey*, Har. (Mich.) Ch. 259.



county treasurers,<sup>1</sup> commissioners to sell land,<sup>2</sup> school trustees,<sup>3</sup> boards of health,<sup>4</sup> who are not permitted to purchase or lease property which as such officers they are authorized to sell or let, or to enter into contracts with themselves for furnishing the labor or materials which they are authorized to contract for upon the public behalf.<sup>5</sup>

## II.

### FOR THE ACTS, DECLARATIONS AND ADMISSIONS OF THE OFFICER.

§ 841. **Stricter Rule prevails than in private Agencies.**—"Different rules," says Mr. Justice CLIFFORD, "prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or the declaration was made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government."<sup>6</sup>

§ 842. **Acts within the Scope of his Authority bind the Public.**—Where, therefore, by law a public officer or agent is authorized to act in reference to a certain matter, his acts done within the scope of the authority so conferred are binding as the acts of his

<sup>1</sup> *Clute v. Barron*, 2 Mich. 192; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356.

<sup>2</sup> *Ingerson v. Starkweather*, Walk. (Mich.) Ch. 346.

<sup>3</sup> *Currie v. School District*, 35 Minn. 163, 27 N. W. Rep. 922; *Pickett v. School District*, 25 Wis. 551, 8 Am. Rep. 105.

*Contra*, see *Junkins v. Union School District*, 39 Me. 220.

<sup>4</sup> *Fort Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127.

<sup>5</sup> *People v. Township Board*, 11 Mich. 222.

<sup>6</sup> *Whiteside v. United States*, 93 U. S. 247, 256, citing *Story on Agency* (6th ed.) § 807 a.; *Lee v. Munroe*, 7 Cranch (U. S.) 366.

principal.<sup>1</sup> But beyond the scope of the authority so conferred, his acts bind himself alone or no one.

§ 843. When bound by his Declarations and Admissions.—Where a public officer or agent is authorized to act or contract, his admissions and declarations made while engaged in the execution of his authority in reference to its subject-matter and so near in point of time as to constitute part of the *res gestae* are binding upon his principal to the same extent as his acts and contracts.<sup>2</sup>

But his declarations and admissions not constituting a part of the *res gestae* or made in respect to a matter over which he has no authority—not being made while engaged in the execution of his lawful authority and in respect to its subject-matter—are not binding upon the public.<sup>3</sup>

### III.

#### BY NOTICE TO THE OFFICER.

§ 844. In private Agencies Notice to Agent is Notice to Principal.—In the case of an agent acting for a private principal,<sup>4</sup> the law imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which

<sup>1</sup> *People v. Stephens*, 71 N. Y. 527; *Gray v. Rollinsford*, 58 N. H. 258; *Harpwell v. Phippsburg*, 29 Me. 313; *Grimes v. Keene*, 52 N. H. 330.

<sup>2</sup> *Glidden v. Unity*, 33 N. H. 571; *Sharon v. Salisbury*, 29 Conn. 113; *La Salle County v. Simmons*, 10 Ill. 513; *Washburn v. Commissioners*, 104 Ind. 821, 54 Am. Rep. 332; *People v. Stephens*, 71 N. Y. 527, 550.

"A fact once admitted by a corporation through its officer, duly and properly acting within the scope of his authority, is evidence against it, and can not be withdrawn to the prejudice of any one who in reliance upon it has changed his situation in respect to the matter affected thereby. In such a case the doctrine of estoppel applies to a corporation as well as

to an individual: *Curnen v. Mayor*, 79 N. Y. 514." Per MILLER, J. in *O'Leary v. Board of Education*, 93 N. Y. 1, 45 Am. Rep. 156.

<sup>3</sup> *Mitchell v. Rockland*, 41 Me. 363, 66 Am. Dec. 253; *Morrell v. Dixfield*, 30 Me. 157; *Burgess v. Wareham*, 7 Gray (Mass.) 845; *Green v. North Buffalo*, 56 Penn. St. 110; *La Salle County v. Simmons*, 10 Ill. 513; *Sooy ads State*, 39 N. J. L. 185, citing *Bank v. Dunn*, 6 Pet. (U. S.) 51; *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173; *United States v. Savings Bank*, 6 McLean (U. S. C. C.) 130; *Peirce v. United States*, 1 Nott & Hun, 270; *Schumack v. Lock*, 10 Moore 39.

<sup>4</sup> See this subject fully discussed in *Mechem on Agency*, §§ 718-731.

the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired and which he then has in mind,<sup>1</sup> or which he had acquired so recently as to reasonably warrant the assumption that he still retained it;<sup>2</sup> provided, however, that such notice or knowledge will not be imputed: 1. where it is such as it is the agent's duty not to disclose,<sup>3</sup> or, 2, where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it,<sup>4</sup> or, 3, where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal.<sup>5</sup>

This rule rests upon the principle that it is the agent's duty to communicate to the principal all knowledge and information possessed by him in respect to the subject-matter of his agency and which is necessary for the principal's protection or guidance.<sup>6</sup> The rule does not depend upon the fact that the agent *has* disclosed the knowledge or information to his principal; subject to the exceptions named, the law conclusively presumes that he has done so, and charges the principal accordingly.<sup>7</sup>

§ 845. **Same Rule applies to private Corporations.**—The same rule applies, and with peculiar force, to private corporations.<sup>8</sup>

<sup>1</sup> *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322; *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *The Distilled Spirits*, 11 Wall. (U. S.) 367; *Fairfield Savings Bank v. Chase*, 72 Me. 226, 29 Am. Dec. 319; *Constant v. University*, 111 N. Y. 604, 7 Am. St. Rep. 769.

<sup>2</sup> *Chouteau v. Allen*, 70 Mo. 290; *Mountford v. Scott*, 1 T. & R. 274; *The Distilled Spirits*, 11 Wall. (U. S.) 367.

<sup>3</sup> *The Distilled Spirits*, 11 Wall. (U. S.) 367; *Fairfield Savings Bank v. Chase*, 72 Me. 226, 29 Am. Rep. 319.

<sup>4</sup> *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 52 Am. Rep. 710; *Dillaway v. Butler*, 135 Mass. 479; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. Rep. 496; *Hum-*

*mel v. Bank of Monroe*, 75 Iowa 690, 37 N. W. Rep. 954; *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736; *Wickersham v. Chicago Zinc Co.* 18 Kans. 481, 26 Am. Rep. 784; *Atlantic National Bank v. Harris*, 118 Mass. 147; *Loring v. Brodie*, 134 Mass. 453; *Kennedy v. Green*, 3 Myl. & Keene 699; *Cave v. Cave*, 15 Ch. Div. 639; *In re European Bank*, 5 Ch. Ap. 358; *In re Marseilles Extension Ry.* 7 Ch. Ap. 161, 1 Eng. Rep. 490.

<sup>5</sup> *National L. Ins. Co. v. Minch*, 53 N. Y. 144.

<sup>6</sup> See Mechem on 'Agency', § 731.

<sup>7</sup> *The Distilled Spirits*, 11 Wall. (U. S.) 367; *Dresser v. Norwood*, 17 Com. B. (N. S.) 466.

<sup>8</sup> See Mechem on Agency, §§ 739-731; *Holden v. Bank*, 72 N. Y. 286; *Union Bank v. Campbell*, 4 Humph.

But, on account of the large number of agents necessarily employed by corporations, it is imperative that the limits fixed to the rule should be observed,—the notice or knowledge must have come to an agent whose powers and authority extend over the particular subject-matter to which the notice or knowledge applies.<sup>1</sup>

Thus the directors of a corporation are not individually its agents for the transaction of its ordinary business, which is usually delegated to its executive officers, such as its president, secretary, treasurer and the like. The powers of the directors reside in them as a board, and not as individuals, and only when they are acting as a board are they the representatives of the corporation. Notice to them when so assembled would be notice to the corporation.<sup>2</sup> So notice to a director actually communicated to the board,<sup>3</sup> or given to him for the express purpose of being communicated to the board,<sup>4</sup> or possessed by him in reference to a matter concerning which he acts with the board and as a member of it,<sup>5</sup> would be imputed to the corporation. But in other cases the private knowledge of one or more individual directors concerning corporate business will not be imputed to the corporation,<sup>6</sup> unless such director has been charged with some

(Tenn.) 394; *Waynesville Nat. Bank v. Irons*, 8 Fed. Rep. 1; *Hart v. Farmers' Bank*, 33 Vt. 253; *Mihills Mfg. Co. v. Camp*, 49 Wis. 180; *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396, 33 Am. Rep. 479; *Farmers' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 363; *Wilson v. McCullough*, 23 Penn. St. 440, 63 Am. Dec. 347; *Fairfield Savings Bank v. Chase*, 72 Me. 228, 39 Am. Rep. 319.

<sup>1</sup> *Conger v. Chicago, &c., Ry. Co.*, 24 Wis. 157, 1 Am. Rep. 164; *Stewart v. Sonneborn*, 49 Ala. 178; *Cook v. Anamosa*, 66 Iowa 427, 23 N. W. Rep. 907; *Russell v. Cedar Rapids Ins. Co.*,—Iowa—, 43 N. W. Rep. 654.

<sup>2</sup> *First National Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 263; *Fulton Bank v. New York Canal Co.* 4 Paige (N. Y.) 137; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380.

<sup>3</sup> *Farmers' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 363; *Bank of Pittsburgh v. Whitehead*, 10 Watts (Penn.) 397, 36 Am. Dec. 186.

<sup>4</sup> *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Boyd v. Chesapeake Canal Co.*, 17 Md. 195, 79 Am. Dec. 646.

<sup>5</sup> *National Security Bank v. Cushman*, 131 Mass. 490; *Innerarity v. Merchants' National Bank*, 139 Mass. 333, 53 Am. Rep. 710; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394; *Bank v. Davis*, 2 Hill (N. Y.) 451; *Savings Bank v. Thomas*, 3 Mo. App. 387.

<sup>6</sup> *Wilson v. McCullough*, 23 Penn. St. 440, 63 Am. Dec. 347; *Farmers' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 363; *Farrel Foundry v. Dart*, 26 Conn. 376; *Winchester v. Baltimore R. R. Co.* 4 Md. 231; *Gen-*

special authority to act for the corporation in respect to the matter to which the notice or knowledge applies.<sup>1</sup>

So, in accordance with the second exception to the general rule, it is held that when the director is himself dealing as the opposite party with the corporation, the corporation will not be charged with notice of that knowledge possessed by the director which his own interest impelled him to conceal,<sup>2</sup> even though he acts with the board in reference to it.<sup>3</sup>

Stockholders in a corporation are, as such merely, in no sense its agents, and notice to them in that capacity only will not be imputed to the corporation.<sup>4</sup>

§ 846. **Notice to the Officer, when Notice to the Public.**—How far all of the rules applicable to private agencies will obtain in respect to public officers is not yet fully settled by the authorities. There is, however, much stronger reason for the application of the general rule, than in the case of private agencies, inasmuch as it is only through its agents and officers that the public can receive official notice in any case. And it is well settled, as a general rule, that notice to a public officer in respect to a matter over which his authority extends, and in reference to which it is his duty to act, is notice to the public.<sup>5</sup> But notice

eral Insurance Co. v. United States Ins. Co., 10 Md. 517, 69 Am. Dec. 174; United States Ins. Co. v. Shriver, 8 Md. Ch. 381; First National Bank v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Westfield Bank v. Cornen, 37 N. Y. 320, 93 Am. Dec. 573; Bank v. Davis, 2 Hill (N. Y.) 463; National Bank v. Norton, 1 Hill (N. Y.) 572; Atlantic Bank v. Savery, 18 Hun 41, s. c. 82 N. Y. 291, 306; Getman v. Second National Bank, 23 Hun (N. Y.) 503; Sawyer v. Pawners' Bank, 6 Allen (Mass.) 207.

<sup>1</sup> Smith v. Bank, 32 Vt. 341.

<sup>2</sup> Innerarity v. Merchants' National Bank, 139 Mass. 332, 52 Am. Rep. 710; First National Bank v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 35 Am.

Dec. 322; National Security Bank v. Cushman, 121 Mass. 491; Frost v. Belmont, 6 Allen (Mass.) 163; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. East. Rep. 496.

<sup>3</sup> Innerarity v. Merchants' National Bank, 139 Mass. 332, 52 Am. Rep. 710; Custer v. Bank, 9 Penn. St. 27; Terrell v. Branch Bank, 12 Ala. 502. See *contra*, Bank v. Davis, 2 Hill (N. Y.) 451, and Union Bank v. Campbell, 4 Humph. (Tenn.) 394; Tagg v. Tennessee Nat. Bank, 9 Heisk. (Tenn.) 479.

<sup>4</sup> Housatonic Bank v. Martin, 1 Metc. (Mass.) 294; Union Canal v. Lloyd, 4 Watts & S. (Penn.) 393.

<sup>5</sup> Notice of a nuisance is insufficient if given to a city clerk who is but a recording officer, unauthorized to re-

or knowledge in reference to a matter over which he has no authority and in respect to which he has no duty to perform can not be deemed notice to the public.

This question has most frequently arisen in its application to municipal corporations, particularly in respect to defective streets, walks and bridges, and it has in some States been regulated by statute.

#### IV.

##### FOR THE TORTS OF ITS OFFICERS.

§ 847. *In general.*—It is not within the scope of this work to enter into a minute discussion of the subject-matter of this chapter, particularly as the questions have most frequently arisen respecting municipal corporations whose liability depends in large measure upon their respective charters and upon the general principles of law governing such bodies, the discussion of which more properly belongs to a treatise upon that subject.

But certain general rules are deemed appropriate here and will be given.

##### 1. *The Liability of the United States.*

§ 848. *United States Government not liable for Torts of its Officers and Agents.*—"No government," says Mr. Justice MR.

ceive or act upon such notice; but it is sufficient if given to the mayor, as he is the chief executive officer, whose duty it is to exercise a general supervision and control over the interests of the city. *Nichols v. Boston*, 98 Mass. 89, 93 Am. Dec. 132.

The knowledge of a policeman of a dangerous and unauthorized obstruction in a public street of a city is notice to the city where the police are charged with the duty of removing nuisances from the street. *Rehberg v. New York*, 91 N. Y. 187, 43 Am. Rep. 657; *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108.

Notice to a city councilman of a defect in a street is notice to the city, although the councilman is not at the time engaged in any official act. *Logansport v. Justice*, 74 Ind. 378, 39 Am. Rep. 79. (ELLIOTT, J., delivered an elaborate dissenting opinion.)

But notice to a city marshal of a defective street is not notice to the city, though notice to the mayor or council would be: *Cook v. Anamosa*, 66 Iowa 427, 23 N. W. Rep. 907.

<sup>1</sup> *Cook v. Anamosa*, 66 Iowa 427, 23 N. W. Rep. 907.

LLER of the Supreme Court of the United States,<sup>1</sup> "has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents. In the language of Judge STORY,<sup>2</sup> 'it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests.'"<sup>3</sup>

## 2. *The Liability of States.*

§ 849. **State not liable for Torts of its Officers or Agents.**—The same rule of immunity is also applied to the States. In a recent case<sup>4</sup> in North Carolina, SMITH, C. J., says, quoting the language of Justice MILLER above cited, "That the doctrine of *respondere superior* applicable to the relation of principal and agent created between other persons, does not prevail against the sovereign in the necessary employment of public agents, is too well settled upon authority and practice to admit of controversy."

In that case it was held that the State is not answerable in damages for injuries sustained by a convict in its State prison through the negligence of the prison officers. And a similar ruling has been made in New York.<sup>5</sup>

## 3. *The Liability of Municipal Corporations.*

§ 850. **Municipal Corporation not liable for Torts of its public Officers.**—The same immunity, except where otherwise declared by express enactment, extends to municipal corporations for the torts of such of its public officers, who, though appointed or elected, and paid by it, are yet charged with the performance of a public service in which the corporation as such has

<sup>1</sup> In *Gibbons v. United States*, 8 Wall. (U. S.) 269.

<sup>2</sup> Story on Agency, § 819.

<sup>3</sup> See *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *Dox v. Postmaster-General*, 1 Peters. (U. S.) 818; *Gibbons v. United States*, 8 Wall.

(U. S.) 269; *Langford v. United States*, 101 U. S. 341.

<sup>4</sup> *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440.

<sup>5</sup> *Lewis v. State*, 96 N. Y. 71, 48 Am. Rep. 607.

no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community.<sup>1</sup>

The power intrusted to the corporation in such cases is intrusted to it as one of the political divisions of the State, and it is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens. The officers who exercise this power are not then the agents or servants of the municipality, but are public officers, agents or servants of the public at large,<sup>2</sup> and the corporation is not responsible for their acts or omissions nor for the acts or omissions of the subordinates appointed by them.<sup>3</sup>

§ 851. **Same Subject—Illustrations of this Rule.**—In pursuance of this rule it has been held that a municipal corporation is not liable for the negligence of its firemen<sup>4</sup> or its fire-department;<sup>5</sup>

<sup>1</sup> *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382; *Torbush v. Norwich*, 38 Conn. 225, 9 Am. Rep. 895; *Elliott v. Philadelphia*, 75 Penn. 342, 15 Am. Rep. 591; *Ogg v. Lansing*, 35 Iowa 495, 14 Am. Rep. 499; *Brown v. Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; *Maximilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468; *Mead v. New Haven*, 40 Conn. 72, 16 Am. Rep. 14; *Robinson v. Evansville*, 87 Ind. 334, 44 Am. Rep. 770; *Greenwood v. Louisville*, 18 Bush (Ky.) 226, 26 Am. Rep. 263; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Welsh v. Rutland*, 56 Vt. 223, 48 Am. Rep. 762; *McElroy v. Albany*, 65 Ga. 387, 38 Am. Rep. 791; *Calwell v. Boone*, 51 Iowa 687, 33 Am. Rep. 154; *Grumbine v. Mayor*, 2 McArthur. (D. C.) 578, 29 Am. Rep. 626; *Pollock v. Louisville*, 18 Bush (Ky.) 221, 26 Am. Rep. 260; *Wallace v. Menasha*, 48 Wis. 79, 33 Am. Rep. 804; *Rowland v. Gallatin*, 75 Mo. 184, 42 Am. Rep. 895; *Summers v. Commissioners*, 103 Ind. 263,

53 Am. Rep. 512; *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. Rep. 31; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Richmond v. Long*, 17 Gratt. (Va.) 375, 94 Am. Dec. 461; *Dargan v. Mobile*, 31 Ala. 469, 70 Am. Dec. 505; *Stewart v. New Orleans*, 2 La. Ann. 461, 61 Am. Dec. 218; *School District v. Williams*, 33 Ark. 454.

See also the cases cited in the following section.

<sup>2</sup> See cases in preceding note, and *Prather v. Lexington*, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 535.

<sup>3</sup> *Maximilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196.

<sup>4</sup> *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382; *Torbush v. Norwich*, 38 Conn. 225, 9 Am. Rep. 895.

<sup>5</sup> *Robinson v. Evansville*, 87 Ind. 334, 44 Am. Rep. 770; *Greenwood v. Louisville*, 18 Bush (Ky.) 226, 26 Am. Rep. 263; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Welsh v. Rutland*, 56 Vt. 223, 48 Am. Rep.



for the negligence, misconduct or trespasses of its police-officers<sup>1</sup> and magistrates;<sup>2</sup> for the negligence of its health officers;<sup>3</sup> for the trespasses of its assessors and collectors of taxes;<sup>4</sup> for the negligence or misconduct of its selectmen,<sup>5</sup> or aldermen,<sup>6</sup> or overseers of the poor;<sup>7</sup> for the negligence of the employees of its commissioners of public charities;<sup>8</sup> for the negligence or trespasses of its surveyor of highways;<sup>9</sup> for the negligence of its boards for the revision and correction of assessments;<sup>10</sup> for the negligence of its department of instruction or of the agents or servants of that department;<sup>11</sup> for the negligence of the officers of its hospitals and asylums;<sup>12</sup> for the negligence of its common council acting in a special capacity by virtue of an act of the legislature, as commissioners for the improvement of a canal.<sup>13</sup>

§ 852. **Municipal Corporation not liable for Acts done ultra Vires.**—So a municipal corporation can not be held liable for the torts of its officers and agents committed in the performance of acts which were wholly beyond the authority or power of the corporation.<sup>14</sup>

769; *Hafford v. New Bedford*, 16 Gray (Mass.) 297; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Burrill v. Augusta*, 78 Me. 118, 57 Am. Rep. 788.

<sup>1</sup>*McElroy v. Albany*, 65 Ga. 387, 38 Am. Rep. 791; *Calwell v. Boone*, 51 Iowa 687, 33 Am. Rep. 154; *Grumbine v. Washington*, 2 McArth. (D. C.) 578, 29 Am. Rep. 636; *Pollock v. Louisville*, 13 Bush (Ky.) 221, 26 Am. Rep. 260; *Buttrick v. Lowell*, 1 Allen (Mass.) 172, 79 Am. Dec. 721; *Campbell v. Montgomery*, 53 Ala. 527, 25 Am. Rep. 656; *Hart v. Bridgeport*, 18 Blatchf. C. C. 289; *Cook v. Macon*, 54 Ga. 468; *Harris v. Atlanta*, 62 Ga. 290; *Odell v. Schroeder*, 58 Ill. 853; *Attaway v. Cartersville*, 68 Ga. 740; *Corsicana v. White*, 57 Tex. 383.

<sup>2</sup>*Grumbine v. Washington*, 2 McArth. (D. C.) 578, 29 Am. Rep. 626.

<sup>3</sup>*Ogg v. Lansing*, 35 Iowa 495, 14 Am. Rep. 499; *Bryant v. St. Paul*, 83

Minn. 289, 53 Am. Rep. 31; *Spring v. Hyde Park*, 137 Mass. 554, 50 Am. Rep. 384; *Mitchell v. Rockland*, 52 Me. 118, a. c. 45 Me. 496; a. c. 41 Me. 363, 66 Am. Dec. 252.

<sup>4</sup>*Rossire v. Boston*, 4 Allen (Mass.) 57; *Alger v. Easton*, 119 Mass. 77; *Dunbar v. Boston*, 112 Mass. 75.

<sup>5</sup>*Cushing v. Bedford*, 135 Mass. 526.

<sup>6</sup>*Child v. Boston*, 4 Allen (Mass.) 41, 81 Am. Dec. 680.

<sup>7</sup>*New Bedford v. Taunton*, 9 Allen (Mass.) 207.

<sup>8</sup>*Maximilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468.

<sup>9</sup>*Walcott v. Swampscott*, 1 Allen (Mass.) 101.

<sup>10</sup>*Tone v. Mayor*, 70 N. Y. 157.

<sup>11</sup>*Ham v. Mayor*, 70 N. Y. 459.

<sup>12</sup>*Murtough v. St. Louis*, 44 Mo. 480; *Sherburne v. Yuba County*, 21 Cal. 118.

<sup>13</sup>*New York, &c., Lumber Co. v. Brooklyn*, 71 N. Y. 580.

<sup>14</sup>*Browning v. Commissioners*, 44

Neither is it liable for the illegal or unauthorized acts of its officers, though done *colore officii*, unless it previously authorized or subsequently ratified them.<sup>1</sup>

§ 853. **Municipal Corporation is liable for Torts of its Servants and Agents committed in Execution of its Powers.**—But it is equally well settled that for the acts of its servants and agents committed in the execution of its general powers, and either previously authorized or subsequently ratified, the municipal corporation is liable like any other master or principal.<sup>2</sup>

It may also be liable for the omissions and neglects of its servants and agents. Thus, says Judge DILLON,<sup>3</sup> “The doctrine may be considered as established that where a duty is a corporate one, that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, and is absolute and perfect, and not discretionary or judicial in its nature, and is one owing to the plaintiff, or in the performance of which he is specially interested, that the corporation is liable in a civil action for the damages resulting to individuals by its neglect to perform the duty, or for the want of proper care or want of reasonable skill of its officers or agents, acting under its direction or authority in the execution of such a duty; and, with the qualifications stated, it is liable, on the same principles and to the same extent, as an individual or private corporation would be under like circumstances.”<sup>4</sup>

Ind. 11; *Haag v. Commissioners*, 60 Ind. 511, 28 Am. Rep. 654; *Mayor of Albany v. Cunliff*, 2 N. Y. 165; *Cuyler v. Rochester*, 12 Wend. (N. Y.) 165; *Morrison v. Lawrence*, 98 Mass. 219; *Seele v. Deering*, 79 Me. 348, 1 Am. St. Rep. 314; *Cavanagh v. Boston*, 189 Mass. 426, 52 Am. Rep. 716; *Hilsdorf v. St. Louis*, 45 Mo. 94, 100 Am. Dec. 352; *Hart v. Bridgeport*, 18 Blatch. C. C. 289.

<sup>1</sup> *Thayer v. Boston*, 19 Pick. (Mass.) 511, 81 Am. Dec. 157; *Brown v. Vinahaven*, 65 Me. 401, 20 Am. Rep.

709; *Woodcock v. Calais*, 66 Me. 234; *Smith v. Rochester*, 76 N. Y. 510; *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1.

<sup>2</sup> *Sprague v. Tripp*, 18 R. I. 38, 43 Am. Rep. 11; *Durkee v. Kenosha*, 59 Wis. 123, 48 Am. Rep. 480; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434.

<sup>3</sup> *Dillon's Munic. Corp.* § 980.

<sup>4</sup> See *Bailey v. Mayor*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Rochester White Lead Works v. Rochester*, 3 N. Y. 467, 53 Am. Dec. 316.

## CHAPTER IX.

## OF THE RIGHTS OF THE OFFICER AGAINST THE PUBLIC.

## § 854. In general.

## I. THE RIGHT TO COMPENSATION.

855. Right to Compensation is created by Law, not by Contract.
856. No Compensation can be recovered unless provided by Law.
857. In Absence of constitutional Prohibition, Compensation may be altered, decreased or discontinued.
858. Constitutional Provisions prohibiting Increase or Decrease during Term.
859. When Officer may recover Compensation of two Offices.
860. Forfeits salary of first Office by accepting incompatible Office.
861. Officer may not recover Reward offered by Public for Act within the Scope of his Duty.
862. Can not recover extra Compensation for added or incidental Services.
863. But may recover for Services in independent Employment.
864. Officer not entitled to Salary during lawful Suspension from Office.
- § 865. But may recover for Period of unlawful Removal.
866. Not deprived of Salary by Sickness.
867. Can only recover when lawfully elected and qualified.
868. Same Subject—Compensation when continued for second Term.
869. Same Subject—Compensation while holding over.
870. Forfeits Right of Compensation with the Office.
871. When Payment to Officer *de Facto* bars Claim of Officer *de Jure*.
872. When Officer recovers, his Recovery not diminished by other Earnings.
873. When Officer may retain Salary from Fees collected.
874. Assignment of unearned Compensation opposed to public Policy.
875. Public may not be garnished for Compensation of its Officers.
876. Public Officer cannot be charged as Garnishee.

## II. RIGHT TO REIMBURSEMENT AND INDEMNITY.

877. Right to Reimbursement.
878. Right to Indemnity.
879. Public has Power to indemnify Officer.

§ 854. In general.—The officer also has rights against the public which it is desirable to consider. The most important of

these are, 1, The officer's right to compensation, 2, The officer's right to indemnity.

# I.

## THE RIGHT TO COMPENSATION.

§ 855. **Right to Compensation is created by Law, not by Contract.**—As has been seen, the relation between an officer and the public is not the creature of contract, nor is the office itself a contract.<sup>1</sup> So his right to compensation is not the creature of contract. It exists, if it exists at all, as the creation of law, and, when it so exists, it belongs to him “not by force of any contract, but because the law attaches it to the office.”<sup>2</sup>

The most that can be said is that there is a contract to pay him such compensation as may from time to time be by law attached to the office.<sup>3</sup>

§ 856. **No Compensation can be recovered unless provided by Law.**—Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously,<sup>4</sup> and he can not recover anything upon the ground of an implied contract to pay what the service is worth.<sup>5</sup>

The rule is otherwise where a person undertakes to render service for a municipal corporation, not as a public officer but as its private agent. In such a case, he may recover the reasonable value.<sup>6</sup>

§ 857. **In Absence of constitutional Prohibition, Compensation may be altered, decreased or discontinued.**—Neither is there any contract, except by virtue of a constitutional provision,

<sup>1</sup> See *ante*, § 463.

<sup>2</sup> See *Fitzsimmons v. Brooklyn*, 103 N. Y. 586, 55 Am. Rep. 835; *Steu. benville v. Culp*, 88 Ohio St. 18, 48 Am. Rep. 417.

<sup>3</sup> *Hoboken v. Gear*, 27 N. J. L. 265; *Locke v. Central City*, 4 Col. 65, 84 Am. Rep. 66.

<sup>4</sup> *State v. Brewer*, 59 Ala. 180;

*Wortham v. Grayson County*, 18 Bush (Ky.) 53.

<sup>5</sup> *White v. Levant*, 78 Me. 568, 7 Atl. Rep. 589; *Talbot v. East Machias*, 76 Me. 415; *Sikes v. Hatfield*, 18 Gray (Mass.) 847; *Walker v. Cook*, 129 Mass. 578.

<sup>6</sup> *Detroit v. Redfield*, 19 Mich. 376. But compare *Sidway v. Park Commissioners*, 120 Ill. 496.

for the permanence of the compensation.<sup>1</sup> Unless restrained by the constitution, the power authorized to fix the compensation may, even during the term of an incumbent, alter or diminish his future compensation or terminate it altogether.<sup>2</sup>

An act, however, fixing the officer's salary at a given sum, is not, unless that clearly appears to be the intention,<sup>3</sup> impliedly repealed or amended by one subsequently passed appropriating for its payment a smaller sum, and the officer is not estopped from recovering the greater sum by the fact that he has accepted the smaller.<sup>4</sup> So where the compensation of an inferior officer is fixed by law, it can not be cut down by the officer's superior, and he may recover the full amount notwithstanding that he has for a time taken the smaller sum.<sup>5</sup> And where the compensation of the officer is to be paid by fees prescribed by law, it is not within the power of the county board of supervisors to fix and pay to the officer an annual salary in lieu of all fees.<sup>6</sup>

Where the compensation of one officer is made the same as that of another officer, an increase in the compensation of the

<sup>1</sup> *Koontz v. Franklin County*, 76 Penn. St. 154.

<sup>2</sup> *Farwell v. Rockland*, 62 Me. 296; *State v. Gales*, 77 N. C. 283; *Castle v. Uinta County*, 2 Wy. 126; *Butler v. Pennsylvania*, 10 How. (U. S.) 402, 416; *Conner v. New York*, 2 Sandf. (N. Y.) 355, 369, 5 N. Y. 235; *Wyandotte v. Drennan*, 46 Mich. 478; *Knapen v. Barry County*, 46 Mich. 22; *United States v. Hartwell*, 6 Wall. (U. S.) 885; *Newton v. Commissioners*, 100 U. S. 559; *Warner v. People*, 2 Denio (N. Y.) 272, 43 Am. Dec. 740; *Perkins v. Corbin*, 45 Ala. 103, 6 Am. Rep. 698; *Augusta v. Sweeney*, 44 Ga. 463, 9 Am. Rep. 172; *State v. Douglass*, 26 Wis. 428, 7 Am. Rep. 87; *People v. Green*, 58 N. Y. 295; *State v. Van Baumbach*, 12 Wis. 310; *Coffin v. State*, 7 Ind. 157; *Evans v. Populus*, 22 La. Ann. 121; *Commonwealth v. Bacon*, 6 S. & R. (Penn.) 822; *Commonwealth v. Mann*, 5 W. & S. (Penn.)

408; *Koontz v. Franklin County*, 76 Penn. St. 154; *French v. Commonwealth*, 78 Penn. St. 389; *County Commissioners v. Jones*, 18 Minn. 199; *People v. Lippincott*, 67 Ill. 333; *Kendall v. Canton*, 53 Miss. 526; *Williams v. Newport*, 12 Bush (Ky.) 438; *State v. Kalb*, 50 Wis. 178; *Robinson v. White*, 26 Ark. 139; *Alexander v. McKenzie*, 2 S. C. 81.

<sup>3</sup> As where the appropriation is expressly made "in full compensation:" *United States v. Fisher*, 109 U. S. 143; or where the appropriation expressly declares that it is made in payment at a different sum: *United States v. Mitchell*, 109 U. S. 143.

<sup>4</sup> *State v. Steele*, 57 Tex. 200; *State v. Cook*, 57 Tex. 205. See also *People v. McCall*, 65 How. (N. Y.) Pr. 442.

<sup>5</sup> *Kehn v. State*, 98 N. Y. 291.

<sup>6</sup> *Hewitt v. White* — Mich. —, 43 N. W. Rep. 1043.

latter does not work a corresponding increase in that of the former officer.<sup>1</sup>

§ 858. **Constitutional Provisions prohibiting Increase or Decrease during Term.**—It is a common provision in the constitutions and statutes of the States, that the salary or compensation of a public officer shall not be increased or diminished during his term.<sup>2</sup> The wisdom of this provision is obvious, and the courts will not permit it to be evaded.<sup>3</sup> Hence, although the increase was made only two days after the commencement of the officer's term, he is not entitled to it.<sup>4</sup>

Where, however, the salary or compensation has not been fixed at all at the time of the election or appointment, this provision does not prevent its being fixed after the term begins.<sup>5</sup>

Although the officer is not entitled to an increase made during his term, he may, if he be re-elected or re-appointed, have it during his second term;<sup>6</sup> but he will not be permitted to evade the provision by resigning his office and being at once re-appointed.<sup>7</sup>

§ 859. **When Officer may recover Compensation of two Offices.**—An officer who holds two or more separate and distinct offices, not incompatible with each other, to each of which compensation is attached, may recover the compensation provided by law for each office.<sup>8</sup> He cannot, however, recover a *per diem* from each of two or more sources for the same day's service.<sup>9</sup>

§ 860. **Forfeits Salary of first Office by accepting incompatible Office.**—As has been seen, an officer holding one office who ac-

<sup>1</sup> Johnston v. Lovett, 65 Ga. 716; Kinsey v. Sherman, 46 Iowa 468.

<sup>2</sup> The language frequently used is, "during his continuance in office." This language is construed to mean during his continuance in office by virtue of his first appointment or election: Smith v. Waterbury, 54 Conn. 174.

<sup>3</sup> Garvie v. Hartford, 54 Conn. 440.

<sup>4</sup> Weeks v. Texarkana, 50 Ark. 81, 6 S. W. Rep. 504.

<sup>5</sup> State v. McDowell, 19 Neb. 442; Purcell v. Parks, 82 Ill. 346; Rucker v. Supervisors, 7 W. Va. 661.

Where an ordinance increasing the

salary is passed before the term begins, officer may receive it, though from the necessity of publication it does not take effect till after the term begins: Stuhr v. Hoboken, 47 N. J. L. 147.

<sup>6</sup> Smith v. Waterbury, 54 Conn. 174.

<sup>7</sup> State v. Hudson County, 44 N. J. L. 388.

<sup>8</sup> United States v. Saunders, 120 U. S. 128, 7 S. C. Rep. 467; *In re* Conrad, 15 Fed. Rep. 641.

<sup>9</sup> Montgomery County v. Bromley, 108 Ind. 153

cepts a second incompatible with the first is held in law thereby absolutely to have forfeited the first office,<sup>1</sup> With the first office also, he thereby forfeits the salary or other compensation attached to it from the time of the acceptance of the second, though no judgment of ouster has been pronounced.<sup>2</sup>

§ 861. **Officer may not recover Reward offered by Public for Act within the Scope of his Duty.**—It is the duty of the officer to execute the functions of his office for the compensation attached to it by law, and he will not be permitted to recover a reward offered by the public for the performance of an act which it was a part of his official duty to perform if he could. To permit such a recovery would contravene the public policy.<sup>3</sup>

§ 862. **Can not recover extra Compensation for added or incidental Services.**—An officer who accepts an office, to which a fixed salary or compensation is attached, is deemed to undertake to perform its duties for the salary or compensation fixed, though it may be inadequate, and if the proper authorities increase its duties by the addition of others germane to the office,<sup>4</sup> the officer must perform them without extra compensation.<sup>5</sup> Neither can he recover extra compensation for incidental or collateral services which properly belong to or form a part of the main office.<sup>6</sup> An

<sup>1</sup> See *ante*, § 420.

<sup>2</sup> State *v.* Comptroller-General, 9 S. C. 259.

<sup>3</sup> Pool *v.* Boston, 5 Cush. (Mass.) 219.

See also *post*, §. 858.

<sup>4</sup> See *ante*, § 465.

<sup>5</sup> Bayha *v.* Webster County, 18 Neb. 181; People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377; Haynes *v.* State, 3 Humph. (Tenn.) 480, 39 Am. Dec. 187; Turpen *v.* Commissioners, 7 Ind. 173; Miami *v.* Blake, 21 Ind. 32; United States *v.* Smith, 1 Bond (U. S. C. C.) 68; Lancaster County *v.* Fulton, — Penn. —, 18 Atl. Rep. 884.

"It is a well settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He can not legally claim additional com-

penation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties are increased and not his salary. His undertaking is to perform the duties of his office, whatever they may be, from time to time during his continuance in office for the compensation stipulated—whether these duties be diminished or increased. Whenever he considers the compensation inadequate, he is at liberty to resign." Evans *v.* Trenton, 24 N. J. L. 764, citing Andrews *v.* United States, 2 STORY, C. C. 203; People *v.* Supervisors, 1 Hill (N. Y.) 363; Bussler *v.* Pray, 7 Serg. & K. (Penn.) 447.

<sup>6</sup> Decatur *v.* Vermillion, 77 Ill. 315;

express contract to pay such extra compensation or an express allowance of it is void.<sup>1</sup>

§ 863. But may recover for Services in independent Employment.—“But this rule nevertheless,” it has been said, “has its limit. It does not follow from the principles laid down that a public officer is bound to perform *all manner of public service* without compensation because his office has a salary annexed to it. Nor is he in consequence of holding an office rendered legally incompetent to the discharge of duties which are clearly extra-official, outside of the scope of his official duty.”<sup>2</sup>

Where, therefore, a public officer is employed to render services in an independent employment, not germane or incidental to his official duties, as where the mayor of a city, who is also an attorney at law, is, without fraud or collusion, employed by the common council to defend a suit against the city,<sup>3</sup> or a police justice is employed to revise the city ordinances,<sup>4</sup> or a receiver of public moneys is employed to assist in disposing of Indian lands,<sup>5</sup> he may recover for such services.

§ 864. Officer not entitled to Salary during Suspension from Office.—An officer who has been lawfully suspended from his office is not entitled to compensation for the period during which he was so suspended, even though it be subsequently determined that the cause for which he was suspended was insufficient. The reason given is “that salary and perquisites are the reward of express or implied services, and therefore cannot belong to one who could not lawfully perform such services.”<sup>6</sup>

§ 865. But may recover for Period of unlawful Removal.—But where an officer, *e. g.*, a city policeman, entitled to a fixed annual salary, was unlawfully removed, and was prevented for a

Rowe v. Kern County, 72 Cal. 353, 14 Pac. Rep. 11; Sidway v. Park Commissioners, 120 Ill. 496.

<sup>1</sup> Adams County v. Hunter, — Iowa —, 43 N. W. Rep. 208; Griffin v. Clay County, 68 Iowa 418.

<sup>2</sup> Evans v. Trenton, 24 N. J. L. 764.

<sup>3</sup> Niles v. Muzzy, 33 Mich. 61, 20 Am. Rep. 670.

<sup>4</sup> McBride v. Grand Rapids, 47 Mich. 236, s. c. 49 Mich. 239.

<sup>5</sup> United States v. Brindle, 110 U. S. 688.

<sup>6</sup> Steubenville v. Culp, 38 Ohio St. 18, 43 Am. Rep. 417, citing Smith v. Mayor, 37 N. Y. 518; Auditors v. Benoit, 20 Mich. 176, 4 Am. Rep. 392; Attorney-General v. Davis, 44 Mo. 181; Westberg v. Kansas City, 64 Mo. 493.



time by no fault of his own from performing the duties of the office, it was held that he might recover, and that the amount that he had earned in other employment during his unlawful removal should not be deducted from his unpaid salary.<sup>1</sup>

And it has been held that he may recover the full amount notwithstanding that during the period of his removal the salary has been paid to another appointed to fill the vacancy unlawfully created.<sup>2</sup>

§ 866. **Not deprived of Salary by Sickness.**— But the sickness of a public officer, to whose office a salary is attached, will not deprive him of his salary while he is permitted to retain the office.<sup>3</sup>

§ 867. **Can only recover when lawfully elected and qualified.**—In order to be entitled to recover from the public the salary or compensation attached to an office, the officer must show that by a lawful election and qualification he is the officer *de jure*. A mere *de facto* officer can not recover.<sup>4</sup>

*A fortiori*, one getting possession of a public office forcibly and without authority cannot recover the salary thereof from the public.<sup>5</sup>

But the fact that the officer *de jure* has, from the wrongful refusal of other officers to recognize him as such, been unable to fully perform the duties of the office, will not prevent his recovery of the salary.<sup>6</sup>

§ 868. **Same Subject — Compensation when continued for second Term.**—It is the rule governing in private agencies that if an agent, employed at a fixed compensation for a definite term, continues in the principal's service after the expiration of that term, without any new or other arrangement, he will be presumed to be continuing on the old terms, and there can be no recovery on a quantum meruit.<sup>7</sup>

<sup>1</sup> Fitzsimmons v. Brooklyn, 103 N. Y. 536, 55 Am. Rep. 835.

<sup>2</sup> Andrews v. Portland, 79 Me. 484, 10 Atl. Rep. 458.

<sup>3</sup> O'Leary v. Board of Education, 98 N. Y. 1, 45 Am. Rep. 156.

<sup>4</sup> Matthews v. Supervisors, 53 Miss. 715, 24 Am. Rep. 715; McCue v. Wa-

pello County, 56 Iowa 698, 41 Am. Rep. 184; Darby v. Wilmington, 76 N. C. 133.

<sup>5</sup> Meehan v. Hudson, 46 N. J. L. 276, 50 Am. Rep. 421.

<sup>6</sup> Williams v. Clayton, — Utah —, 21 Pac. Rep. 898.

<sup>7</sup> Mechem on Agency, §§ 212, 608;

The same rule has been applied to public officers who, being employed for a fixed term at a given salary, are continued for a second term with no new adjustment of the salary: they are presumed to continue at the old rate and cannot, therefore, recover on a quantum meruit.<sup>1</sup>

§ 869. **Same Subject—Compensation while holding over.**—An officer lawfully holding over is entitled to receive the compensation attached to the office until his successor is chosen and qualified, even though the qualification is deferred by delay in canvassing the votes.<sup>2</sup>

§ 870. **Forfeits Right to Compensation with the Office.**—The right to receive or recover the salary or other compensation attached to an office being vested in him only who is by law the duly chosen and qualified incumbent of it, it follows necessarily that when the right of the officer to the office ceases, either through his resignation, removal, misconduct or abandonment, his right to longer receive the compensation thereupon ceases also.<sup>3</sup>

§ 871. **When Payment to Officer *de Facto* bars Claim of Officer *de Jure*.**—But where the title to the office is in controversy, and one of the claimants has entered under color of title and performed the duties of the office, and drawn the salary for the time he so performed, the other claimant, upon establishing his title to the office, can not recover from the public the amount so paid to the officer *de facto* for the services performed by him before the adjudication upon the title.<sup>4</sup> The remedy of the offi-

Sines v. Superintendents of the Poor, 58 Mich. 508; Tallon v. Mining Co. 55 Mich. 147; Tatterson v. Suffolk Mfg. Co. 106 Mass. 56; Alba v. Moriarty, 36 La. Ann. 680; McCullough Iron Co. v. Carpenter, 67 Md. 554; Weise v. Milwaukee County Supervisors, 51 Wis. 564; Wallace v. Floyd, 29 Penn. St. 184, 73 Am. Dec. 630; Ranck v. Albright, 36 Penn. St. 371.

<sup>1</sup> Capps v. Adams County, — Nebr. —, 48 N. W. Rep. 114.

<sup>2</sup> Hubbard v. Crawford, 19 Kana. 570.

<sup>3</sup> State v. Comptroller-General, 9 S.

O. 269; Chisholm v. Coleman, 48 Ala. 204, 94 Am. Dec. 678.

<sup>4</sup> Auditors v. Benoit, 20 Mich. 176, 4 Am. Rep. 382; Dolan v. Mayor, 68 N. Y. 274, 23 Am. Rep. 163; Saline County v. Anderson, 20 Kana. 298, 27 Am. Rep. 171; Shaw v. Pima County, — Ariz. —, 18 Pac. Rep. 273; Selby v. Portland, 14 Ora. 243, 58 Am. Rep. 307; 12 Pac. Rep. 377; Hannon v. Grizzard, 96 N. C. 293, 2 S. E. Rep. 600; Parker v. Supervisors, 4 Minn. 59; McAfee v. Russell, 29 Miss. 84, 97; Wheatley v. Covington, 11 Bush (Ky.) 18, 22; Mo-

cer *de jure* is, as has been seen,<sup>1</sup> in an action against the officer *de facto* to recover the amount so received by him. The fact that the officer *de facto* is insolvent, does not affect the question.<sup>2</sup>

But where the public authorities continue to pay the officer *de facto* after notice of the adjudication in favor of the officer *de jure*, the latter may recover from the public the amount so paid after such adjudication and notice.<sup>3</sup>

§ 872. When Officer recovers, his Recovery is not diminished by other Earnings.—When the officer who has been unlawfully deprived of the office is found to be entitled to recover, the amount that he has earned in the interval at other employment is not to be deducted from the salary due him.<sup>4</sup> The contrary rule prevailing in actions between master and servant has no application here, “and for the obvious reason,” says the court of appeals of New York,<sup>5</sup> “that there is no broken contract, or damages for its breach where there is no contract. We have often held that there is no contract between the officer and the State or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it. When he does so, he is entitled to its amount, not by force of any contract, but because the law attaches it to the office, and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown.”

*Manus v. Brooklyn*, 5 N. Y. Supplement, 424.

*People v. Smyth*, 28 Cal. 21, and *Carroll v. Siebenthaler*, 37 Cal. 193, have been elsewhere disapproved, as in *Auditors v. Benoit*, *supra*, and *Saline County v. Anderson*, *supra*.

*Memphis v. Woodward*, 13 Heisk. (Tenn.) 499, 27 Am. Rep. 750, is opposed to the text, but, as is said in the note by the editor of the American Reports, it is opposed to the weight of authority. *Andrews v. Portland*, 79 Me. 484, is also opposed to the text. It was there held that

knowledge that the title was in litigation was notice of the plaintiff's claim, and that the legal title would draw with it the salary.

<sup>1</sup> See *ante*, § 333.

<sup>2</sup> *Saline County v. Anderson*, 20 Kans. 298, 27 Am. Rep. 171.

<sup>3</sup> *McVeany v. Mayor*, 80 N. Y. 138, 36 Am. Rep. 600.

<sup>4</sup> *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 55 Am. Rep. 835; *Andrews v. Portland*, 79 Me. 484.

<sup>5</sup> *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 55 Am. Rep. 835.

§ 873. **When Officer may retain Salary from Fees collected.** — An officer who is compensated by a salary payable out of the public treasury, and whose duty it is to pay into the treasury the fees received by him, cannot retain from such fees the amount of his salary, or offset the amount due to him as salary against an action for the fees so collected.<sup>1</sup> Said the court in such a case of one who was wharfinger of a city and *ex officio* collector of levee dues: "His duties were to collect the moneys due to the city in the department in which he held office; his obligation was to deposit the money so collected in the city treasury. His salary was to be paid as the salaries of other officers of the city were paid, to wit: out of the common treasury. There is no place for the plea of compensation in a case of this kind. Compensation takes place of right between individuals when the debts due by the respective parties are equally due and demandable, and where the character of the debts is the same. It cannot be opposed by a fiduciary acting in the line of his duty. There is no such thing as compensating a debt due by an agent for moneys collected by him in the performance of his duties, by a debt due by the principal to the agent. No officer of a government, State or municipal, is empowered to pay himself his salary, or plead in compensation a demand made against him for moneys collected by him in his official capacity, by an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof and to get his pay as other officers get theirs. In other words, he cannot pay himself."<sup>2</sup>

§ 874. **Assignment of unearned Compensation opposed to public Policy.**—While the compensation already earned by a public officer may validly be assigned by him, it is settled by a clear preponderance of authority that an assignment of future compensation not yet earned, whether payable by salary or fees, is opposed to public policy and void.<sup>3</sup> "Salaries," it is said in one

<sup>1</sup> *New Orleans v. Finnerty*, 27 La. Ann. 681, 21 Am. Rep. 569.

<sup>2</sup> *New Orleans v. Finnerty*, (1875) 27 La. Ann. 681, 21 Am. Rep. 569, per MORGAN, J.

<sup>3</sup> *Bliss v. Lawrence*, 58 N. Y. 442,

17 Am. Rep. 273; *Bangs v. Dunn*, 66 Cal. 74, 4 Pac. Rep. 963; *Schloss v. Hewlett*, 81 Ala. 266, 1 S. Rep. 263; *King v. Hawkins*, — Ariz. —, 16 Pac. Rep. 434; *Flarty v. Odium*, 8 T. R. 681; *Stone v. Lidderdale*, 2 Anstr.

case,<sup>1</sup> "are, by law, payable after work is performed and not before, and, while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of the law-makers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. It is true that, in respect to officers removable at will, this evil could in some measure be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees, by notice to the government, would, on ordinary principles, be entitled to receive pay directly and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service."

§ 875. Public may not be garnished for Compensation of its Officers.—It is well settled that the public, whether it be the United States,<sup>2</sup> State<sup>3</sup> or municipal government such as that of counties,<sup>4</sup>

588; *Davis v. Marlboro*, 1 Swanst. 79; *Lidderdale v. Montrose*, 4 T. R. 248; *Barwick v. Read*, 1 H. Bl. 627; *Arbuckle v. Cowtan*, 8 Bos. & P. 828; *Wells v. Foster*, 8 M. & W. 149; *Hunter v. Gardner*, 6 Wilson & Shaw, 618; *Hill v. Paul*, 8 Cl. & Fin. 807; *Palmer v. Bate*, 2 Brod. & Bing. 673; *Liverpool v. Wright*, 28 L. J. (N. S.) Ch. 871; *Palmer v. Vaughan*, 3 Swanst. 178; *Parsons v. Thompson*, 1 H. Bl. 822.

*State Bank v. Hastings*, 15 Wis. 78, is *contra*, but this case is disapproved in other American cases.

*Brckett v. Blake*, 7 Metc. (Mass.) 285, 41 Am. Dec. 442, is also, at least, indirectly, *contra*. See also *Mulhall v. Quinn*, 1 Gray (Mass.) 105,

61 Am. Rep. 414; *Macomber v. Doane*, 2 Allen (Mass.) 541.

<sup>1</sup> *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 278, per JOHNSON, J.

<sup>2</sup> *Buchanan v. Alexander*, 4 How. (U. S.) 20.

<sup>3</sup> *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 439, 18 Am. Dec. 194; *McMeekin v. State*, 9 Ark. 558; *Tracy v. Hornbuckle*, 8 Bush (Ky.) 836; *Dewey v. Garvey*, 180 Mass. 86.

<sup>4</sup> *Ward v. Hartford*, 12 Conn. 404; *McDougal v. Hennepin County*, 4 Minn. 184; *Boone County v. Keck*, 81 Ark. 387; *Commissioners v. Bond*, 8 Col. 411; *Wallace v. Lawyer*, 54 Ind. 501, 28 Am. Rep. 661; *State v. Eberly*, 12 Neb. 616.

townships,<sup>1</sup> cities<sup>2</sup> and school districts<sup>3</sup> can not be charged in garnishment or attachment for the compensation due to its public officers. This exemption is based upon public policy, and is not for the benefit of the officer but for that of the public that the latter may not be harassed or inconvenienced by suit against it, and that the efficiency of its servants be not interfered with by any uncertainty as to their payment.

§ 876. **Public Officer can not be charged as Garnishee.**—It is also well settled that a public officer, who has money in his hands which is due from him in his official capacity to a third person, can not be charged as the garnishee of such person on account of such indebtedness. This rule has been applied to county treasurers,<sup>4</sup> clerks of courts,<sup>5</sup> sheriffs,<sup>6</sup> justices of the peace,<sup>7</sup> receivers<sup>8</sup> and the like.

But if the officer does not hold the money and owe a duty to disburse it in his official capacity, but merely as the agent, bailee or debtor of the third person, it may be reached by garnishment. Thus money in a sheriff's hands which remains after satisfying an execution against the debtor,<sup>9</sup> or money in the hands of a

<sup>1</sup>Bradley v. Richmond, 6 Vt. 121; Jenks v. Osceola Township, 45 Iowa 554.

But see Whidden v. Drake, 5 N. H. 12.

<sup>2</sup>Memphis v. Laski, 9 Helak. (Tenn.) 511, 24 Am. Rep. 331; Hawthorn v. St. Louis, 11 Mo. 59, 47 Am. Dec. 141; Merwin v. Chicago, 45 Ill. 133, 92 Am. Dec. 204; McLellan v. Young, 54 Ga. 399, 21 Am. Rep. 276; Erie v. Knapp, 29 Penn. St. 173; Baltimore v. Root, 8 Md. 95; Mobile v. Rowland, 26 Ala. 496; Fortune v. St. Louis, 23 Mo. 239; Burnham v. Fond du Lac, 15 Wis. 193; Buffham v. Racine, 26 Wis. 449; Merrell v. Campbell, 49 Wis. 535; People v. Omaha, 2 Neb. 166.

*Contra*, Rodman v. Musselman, 19 Bush (Ky.) 354, 23 Am. Rep. 724.

<sup>3</sup>Marathon School District v. Gage, 39 Mich. 484, 33 Am. Rep. 431; Hightower v. Slaton, 54 Ga. 108, 21

Am. Rep. 278; Clark v. Mobile School Commissioners, 36 Ala. 621.

<sup>4</sup>Chealey v. Brewer, 7 Mass. 259; Stillman v. Isham, 11 Conn. 124.

<sup>5</sup>Ross v. Clarke, 1 Dall. 354; Hunt v. Stevens, 3 Ired. (N. C.) 365.

<sup>6</sup>Robinson v. Howard, 7 Cush. (Mass.) 257; Morris v. Penniman, 14 Gray (Mass.) 230, 74 Am. Dec. 675; Farmers' Bank v. Beaton, 7 Gill & J. (Md.) 431, 28 Am. Dec. 236; Lightner v. Steinagel, 33 Ill. 510, 85 Am. Dec. 292.

<sup>7</sup>Corbyn v. Bollman, 4 Watts & Serg. (Penn.) 343.

<sup>8</sup>People v. Brooks, 40 Mich. 333; Glenn v. Gill, 2 Md. 1; Taylor v. Gillean, 23 Tex. 508.

<sup>9</sup>King v. Moore, 6 Ala. 160, 41 Am. Dec. 44; Watson v. Todd, 5 Mass. 271; Tucker v. Atkinson, 1 Humph. (Tenn.) 300, 34 Am. Dec. 650; Pierce v. Carleton, 19 Ill. 353, 54 Am. Dec. 405; Adams v. Lane, 33 Vt. 640.

clerk of court which he has been ordered to pay over,<sup>1</sup> or money in the possession of a justice of the peace which he holds as agent of the party,<sup>2</sup> may be reached by garnishment, as the officer, in all of these cases, does not hold it as officer but as a mere debtor or bailee.

## II.

### RIGHT TO REIMBURSEMENT AND INDEMNITY.

§ 877. **Right to Reimbursement.**—Where a public officer in the due performance of his duty, has been expressly or impliedly required by law to incur expense on the public account, not covered by his salary or commission and not attributable to his own neglect or default, the reasonable and proper amount thereof forms a legitimate charge against the public for which he should be reimbursed. Such a charge may be recovered by action against such inferior municipal governments as are subject to the ordinary process of courts, or against the State or United States government when appropriate tribunals or remedies are provided for that purpose, or credit should be allowed for it in his account.<sup>3</sup>

§ 878. **Right to Indemnity.**—So, it would seem, that, within the same limits, the officer is entitled to be indemnified by the public against the consequences of acts which he has been expressly or impliedly required to perform upon the public account, and which are not manifestly illegal and which he does not know to be wrong. Such a right is enforced in the case of a private agent.<sup>4</sup>

<sup>1</sup> Gaither v. Ballew, 4 Jones (N. C.) 498, 69 Am. Dec. 768.

<sup>2</sup> Clark v. Boggs, 6 Ala. 809, 41 Am. Dec. 85.

<sup>3</sup> United States v. Flanders, 112 U. S. 88; Andrews v. United States, 2 Story C. C. 202; Powell v. Newburgh, 19 Johns. (N. Y.) 284.

<sup>4</sup> Mechem on Agency, § 653; Moore v. Appleton, 26 Ala. 683, 2 C. 34 Ala. 147, 73 Am. Dec. 448; Ramsay v.

Gardner, 11 Johns. (N. Y.) 439; Stocking v. Sage, 1 Conn. 523; Greene v. Goddard, 9 Metc. (Mass.) 212; Powell v. Newburgh, 19 Johns. (N. Y.) 284; Avery v. Halsey, 14 Pick. (Mass.) 174; Drummond v. Humphreys, 39 Me. 347; Saveland v. Green, 36 Wis. 612; Howe v. Buffalo, &c. R. R. Co. 37 N. Y. 297; Nelson v. Cook, 17 Ill. 443; Adamson v. Jarvis, 4 Bing. 66.

But however may be the question of the right—

§ 879. **Public has Power to indemnify Officers.**—It is well settled that the public, such as towns or cities, have the *power* to indemnify their officers against liability which they may incur in the *bona fide* discharge of their duties, and may raise money for that purpose,<sup>1</sup> or appropriate to it money raised for general purposes,<sup>2</sup> even though the result may show that the officers exceeded their legal authority.<sup>3</sup> But the subject must be one concerning which the municipality has a duty to perform, an interest to protect or a right to defend, and in which it has a pecuniary or corporate interest.<sup>4</sup>

Where, however, the subject-matter is one in which the municipality has no interest and in reference to which it has no duty or authority; where it has no direction or control over the officer, is not responsible for his fidelity, gains nothing by his diligence and loses nothing by his want of care; where the duties are imposed specifically upon the officer by statute and the municipality has no duty to perform, no right to defend and no interest to protect, in such cases the right to indemnify does

<sup>1</sup> *Cushing v. Stoughton*, 6 Cush. (Mass.) 392; *Fuller v. Groton*, 11 Gray (Mass.) 340; *Friend v. Gilbert*, 108 Mass. 412; *Lawrence v. McAlvin*, 109 Mass. 812.

<sup>2</sup> *State v. Hammondon*, 9 Vroom (N. J.) 430, 20 Am. Rep. 404.

<sup>3</sup> *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566, 29 Am. Dec. 623.

<sup>4</sup> Thus the town may indemnify members of a school committee sued for libel because of statements in their official reports: *Fuller v. Groton*, 11 Gray (Mass.) 340; or for digging a ditch for the purpose of settling the bounds of a highway: *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566, 29 Am. Dec. 623; or to refund a tax illegally assessed and collected: *Nelson v. Milford*, 7 Pick. (Mass.) 18; *Pike v.*

*Middleton*, 12 N. H. 281; or for bringing an action to recover public moneys, on account of which they were sued for malicious prosecution: *State v. Hammondon*, 9 Vroom (N. J.) 430, 20 Am. Rep. 404; or for expenses incurred in defending an unsuccessful investigation into their official conduct, which had been ordered to be made by the city government: *Lawrence v. McAlvin*, 109 Mass. 811; or against an action for false imprisonment based upon discharge of his official duty: *Sherman v. Carr*, 8 R. I. 431; or for defending town property: *Babbitt v. Savoy*, 8 Cush. (Mass.) 530; *Briggs v. Whipple*, 6 Vt. 95; or for appropriating certain property to build a town hall: *Hadsell v. Hancock*, 8 Gray (Mass.) 526.



not exist, and any attempt to do so, or any vote or contract to that effect, will be void.<sup>1</sup>

<sup>1</sup> *Merrill v. Plainfield*, 45 N. H. 196, and *Gove v. Epping*, 41 N. H. 545, where it was held that a town could not lawfully indemnify its selectmen for resisting criminal prosecutions brought against them for refusing to insert names of voters upon the proper list: *Gregory v. Bridgeport*, 41 Conn. 76, 19 Am. Rep. 458, where it was held that a city may not indemnify an officer against the consequences of an act committed while he was not

acting in an official capacity for the city. So public funds can not be appropriated to indemnify officers for refusing to discharge their official duties: *Halstead v. Mayor*, 8 N. Y. 480; nor to indemnify justice of the peace prosecuted for official misconduct: *People v. Lawrence*, 6 Hill (N. Y.) 244; nor to indemnify a cattle driver for impounding cattle: *Vincent v. Nantucket*, 12 Oush. (Mass.) 105.

## CHAPTER X.

### OF THE RIGHTS OF THE OFFICER AGAINST THIRD PERSONS.

#### § 880. Purpose of this Chapter.

##### I. HIS RIGHT TO COMPENSATION.

- 881. Officer can not recover from third Person where his Compensation is paid by the Public.
- 882. When Payment of Fees is regulated by Law, Officer can not recover otherwise.
- 883. Officer making void Contract for Fees can not recover *quantum meruit*.
- 884. Fees unlawfully exacted may be recovered or set off.
- 885. Officer can not recover Reward for Act within Line of Duty.
- 886. When no Fees are fixed ministerial Officer may recover reasonable Value.
- 887. Officer may demand Prepayment of his Fees.
- 888. Officer may retain Papers on which he has expended Labor until paid.

##### II. HIS RIGHT TO REIMBURSEMENT AND INDEMNITY.

- § 889. Right of Reimbursement.
- 890. Indemnity to Officer.

##### III. RIGHT OF ACTION FOR TORTS.

- 891. May recover for Injury to Property in his Possession.
- 892. When Officer must sue in Name of his Office.

##### IV. RIGHT OF ACTION UPON BONDS, CONTRACTS, &c.

- 893. Has implied Right to bring necessary Actions.
- 894. Right to sue in his own Name on Bonds.
- 895. Same Subject—Officer suing should sue by his official Title.
- 896. Officer can not sue in his own Name on simple Contracts made in Behalf of Public.

§ 880. Purpose of this Chapter.—The officer has rights against third persons also which are important to be considered. The third persons will be those usually who have employed him in his official capacity, but he may have rights against strangers as well. Chief among the rights against those who employ him will be: 1, his right to compensation; 2, his right to reimbursement and indemnity; against strangers the most important will be—3, his right to recover for injuries to property or rights in his possession or under his control as an officer.

## I.

## HIS RIGHT TO COMPENSATION.

§ 881. **Officer can not recover from third Person where his Compensation is paid by the Public.**—A public officer whose salary or compensation is fixed by law and is payable by or made a charge against the public, cannot recover compensation from third persons for the performance of acts within the scope of his official duty, even though the acts were performed at their request,<sup>1</sup> or though they may have expressly promised to pay him.<sup>2</sup> The performance of his official duties for such members of the public as have occasion to require them, when the duties are owing to individuals, or for the public at large, when they are owing only to the public, forms the consideration for which the public undertakes to pay him his official salary or compensation, and it would be contrary to public policy to permit him to recover more.<sup>3</sup>

§ 882. **When Payment of Fees is regulated by Law, Officer can not recover otherwise.**—So where the payment of fees for specified services is regulated by law, the officer can not recover additional compensation or any greater or different fees than those fixed,<sup>4</sup> even though the party employing him expressly promised to pay more;<sup>5</sup> nor from other persons than those specified, though the services may have been performed at the request of another party.<sup>6</sup>

<sup>1</sup> Brophy v. Marble, 118 Mass. 548, citing Andrews v. United States, 2 Story C. C. 202; Converse v. United States, 21 How. (U. S.) 468; Hatch v. Mann, 15 Wend. (N. Y.) 44; Evans v. Trenton, 24 N. J. L. (4 Zab.) 764; Pool v. Boston, 5 Cush. (Mass.) 219; New Haven, &c., Co. v. Hayden, 117 Mass. 433.

<sup>2</sup> See Hatch v. Mann, 15 Wend. (N. Y.) 44.

<sup>3</sup> See ante, § 874.

<sup>4</sup> Wilcoxson v. Andrews, 66 Mich. 553, 83 N. W. Rep. 533; Peck v. Bank,

51 Mich. 353, 16 N. W. Rep. 681; Burk v. Webb, 82 Mich. 174; Vandercook v. Williams, 106 Ind. 345, 1 N. E. Rep. 619; Fort Wayne v. Lehr, 88 Ind. 62; Willemin v. Bateson, 63 Mich. 309.

<sup>5</sup> A contract or agreement to pay more than the legal fees, is void as opposed to public policy. Hatch v. Mann, 15 Wend. (N. Y.) 44; Vandercook v. Williams, 106 Ind. 345; Fort Wayne v. Lehr, 88 Ind. 62.

<sup>6</sup> Baldwin v. Kouns, 81 Ala. 273, 3 S. Rep. 638.

But where the statute prescribes the fees which the officer shall receive, but omits to specially provide when, how or by whom they shall be paid, it is the general rule that the person at whose request the service is rendered is liable, and the officer is entitled to payment as the services are performed.<sup>1</sup>

Obviously, where the fees for particular services are fixed by law, the officer cannot recover *quantum meruit*, especially where he seeks to recover more than the law allows.<sup>2</sup>

§ 883. Officer having made Contract as to Fees void as against public Policy cannot recover quantum meruit.—So where the officer has made a special contract in reference to his fees or compensation which is void as opposed to public policy,<sup>3</sup> he cannot, by disregarding the contract, recover on a *quantum meruit*.<sup>4</sup> "It is a remarkable claim," says CAMPBELL, O. J., "that where work is done under such a contract, the contract may be treated as null, and the services regarded as rendered properly. No one can use a void contract as a means of getting better terms than he could have claimed under it. The whole transaction is covered by the same taint and must be treated as beyond the protection of courts of justice."<sup>5</sup>

§ 884. Fees unlawfully exacted may be recovered or set off.—If the officer has demanded and received illegal fees, they may be recovered by the party paying them, though paid without protest,<sup>6</sup> or they may be set off in an action brought by the officer to recover other fees lawfully due.<sup>7</sup>

§ 885. Officer can not recover Reward for Act within line of his Duty.—So, upon grounds of public policy,<sup>8</sup> it is settled that a public officer cannot recover from an individual a reward offered by the latter for the performance of an act which it was

<sup>1</sup> Baldwin v. Kouns, 81 Ala. 272; People v. Harlow, 29 Ind. 42; Ripley v. Gifford, 11 Iowa 367.

<sup>2</sup> Wilcoxson v. Andrews, 66 Mich. 553, 33 N. W. Rep. 533.

<sup>3</sup> As to this, see *ante*, §§ 374-377.

<sup>4</sup> Willemin v. Bateson, 63 Mich. 809; Wilcoxson v. Andrews, 66 Mich. 553. See Hawkeye Ins. Co. v. Brainard, 72 Iowa 130.

<sup>5</sup> In Willemin v. Bateson, 63 Mich. 809.

<sup>6</sup> American Steamship Co. v. Young, 89 Penn. St. 186, 33 Am. Rep. 748. See also Prior v. Craig, 5 Serg. & R. (Penn.) 44; Walker v. Ham, 2 N. H. 283; Reed v. Cist, 7 Serg. & R. (Penn.) 183.

<sup>7</sup> Dew v. Parsons, 2 B. & Ald. 562.

<sup>8</sup> See *ante*, § 376.

the officer's official duty to perform if he could. For all acts within the line of his official duty, the fees or salary provided by law, are deemed to be an adequate compensation, and the officer will not be permitted to recover more.<sup>1</sup>

But for an act which is not within the scope of his duty, and which his office does not require him to perform, the officer may receive a reward like a private individual,<sup>2</sup> as where a sheriff, in reliance upon the offer of a reward, searches for a criminal who has escaped beyond his county, and captures him in another county,<sup>3</sup> or follows a fugitive from justice and apprehends him in another State,<sup>4</sup> or makes the arrest while the officer is temporarily suspended from duty,<sup>5</sup> or is only a special constable.<sup>6</sup>

§ 886. Where no Fees are fixed, ministerial Officer may recover reasonable Value.—Where, however, no fees or compensation are fixed by law, a public ministerial officer required to render services for individuals, for which it is clear the law intended he should be paid, may, where no other agreement is made, recover from such individual the reasonable value of the services rendered.<sup>7</sup>

§ 887. Officer may demand Prepayment of his Fees.—In the absence of a statute to the contrary, a public ministerial officer entitled to a fixed fee or reasonable compensation, may, unless he has waived his right, insist that the individual who requires his services shall pay his fees before the service is rendered.<sup>8</sup>

§ 888. Officer may retain Papers on which he has expended Labor until paid.—So, it is said, that for any services rendered the officer may retain any papers or documents in his possession

<sup>1</sup> *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658; *Stamper v. Temple*, 6 Humph. (Tenn.) 118, 44 Am. Dec. 296; *Smith v. Whildin*, 10 Penn. St. 39, 49 Am. Dec. 572; *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1; *Gillmore v. Lewis*, 12 Ohio 281; *Day v. Putnam Ins. Co.*, 16 Minn. 408; *Warner v. Grace*, 14 Minn. 487; *Marking v. Needy*, 8 Bush (Ky.) 22; *Brown v. Godfrey*, 33 Vt. 120; *City Bank v. Bangs*, 2 Edw. (N. Y.) Ch. 95.

<sup>2</sup> *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315; *Hayden v. Souger*, 56

Ind. 42, 26 Am. Rep. 1; *Pille v. New Orleans*, 19 La. Ann. 274; *Smith v. Moore*, 1 O. B. 438.

<sup>3</sup> *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315 (distinguishing *Brown v. Godfrey*, 33 Vt. 120); *Russell v. Bartlett*, 44 Vt. 170.

<sup>4</sup> *Gregg v. Pierce*, 53 Barb. 387; *Morrell v. Quarles*, 35 Ala. 544.

<sup>5</sup> *Smith v. Moore*, 1 O. B. 438.

<sup>6</sup> *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1.

<sup>7</sup> *Ripley v. Gifford*, 11 Iowa 367.

<sup>8</sup> *Ripley v. Gifford*, 11 Iowa 367.

in and about which he has bestowed labor, until his compensation therefor is paid.<sup>1</sup>

## II.

### HIS RIGHT TO REIMBURSEMENT AND INDEMNITY.

§ 889. **Right to Reimbursement.**—A public ministerial officer who is called upon by an individual to render for him official services, in the course of the performance of which the officer is obliged in good faith and for his employer's benefit, to incur expenses, not covered by his salary or fees and not attributable to his own neglect or default, is entitled to be reimbursed for such expenses by the party so employing him.<sup>2</sup>

But he is not entitled to reimbursement for expenses caused by his own negligence or default, or incurred in violation of his duty or in opposition to the directions of his principal.<sup>3</sup>

§ 890. **Indemnity to Officer.**—An agreement to indemnify an officer against the consequence of an act known to him to be unlawful is void as opposed to the policy of the law.<sup>4</sup> So, clearly, is an agreement void for the indemnity of an officer for violating or neglecting his official duty.<sup>5</sup>

But where the act is not known to be unlawful, and where the parties employing the officer are acting in good faith in the assertion of what they believe to be their rights under the law, an agreement to indemnify the officer will be valid, even though it should subsequently appear that they were not justified in doing the acts against the consequences of which the indemnity was given.<sup>6</sup>

<sup>1</sup> *Ripley v. Gifford*, 11 Iowa 367.

<sup>2</sup> See *Ruffner v. Hewitt*, 7 W. Va. 535; *Warren v. Hewitt*, 45 Ga. 501; *Maitland v. Martin*, 86 Penn. St. 120; *Beach v. Branch*, 57 Ga. 363; *Searing v. Butler*, 69 Ill. 575; *Elliott v. Walker*, 1 Rawle (Pa.) 126.

<sup>3</sup> See *Godman v. Melzel*, 65 Ind. 33; *Maitland v. Martin*, 86 Penn. St. 120.

<sup>4</sup> *Collier v. Windham*, 27 Ala. 291; *Prewitt v. Garrett*, 6 Ala. 128, 41 Am.

Dec. 40; *Hunter v. Agee*, 5 Humph. (Tenn.) 57; *Morgan v. Hale*, 12 W. Va. 718.

<sup>5</sup> *Hodsdon v. Wilkins*, 7 Greenl. (Me.) 113, 20 Am. Dec. 347; *Ayer v. Hutchins*, 4 Mass. 370, 3 Am. Dec. 233; *Love v. Palmer*, 7 Johns. (N. Y.) 159; *Webber v. Blunt*, 19 Wend. (N. Y.) 188, 33 Am. Dec. 445; *Buffen-deau v. Brooks*, 28 Cal. 641.

See also *ante*, § 868.

<sup>6</sup> *Ives v. Jones*, 8 Ired. (N. C.) L.

The necessity for indemnity arises most frequently in the case of ministerial officers who are called upon to execute the process of courts and judicial officers, and the question in respect to such officers has been fully discussed in another place.<sup>1</sup>

### III.

#### RIGHT OF ACTION FOR TORTS.

§ 891. **May recover for Injury to Property in his Possession.**—A public officer who has the goods of another peaceably in his possession may, by virtue of that possession alone, recover against a mere stranger for trespasses committed by him in respect to the goods, as by injuring or converting them.<sup>2</sup>

So where, by virtue of his office, he has acquired a special property in the goods, as in the case of a sheriff or other officer who has made a valid levy upon them, the public officer may recover to the extent of his interest against any one, though it be the general owner himself,<sup>3</sup> who injures or converts them.<sup>4</sup>

588, 40 Am. Dec. 421; *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; *McCartney v. Shepard*, 21 Mo. 573, 64 Am. Dec. 250; *Jacobs v. Pollard*, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83; *Cumpton v. Lambert*, 18 Ohio 81, 51 Am. Dec. 442; *Acheson v. Miller*, 2 Ohio St. 203, 59 Am. Dec. 668; *Marsh v. Gold*, 2 Pick. (Mass.) 285; *Anderson v. Farns*, 7 Blackf. (Ind.) 343; *Stark v. Raney*, 18 Cal. 622; *Davis v. Tibbats*, 7 J. J. Marsh. (Ky.) 264; *Stan-ton v. McMullen*, 7 Ill. Ap. 326.

<sup>1</sup> See *ante*, §§ 748-750.

<sup>2</sup> *Cooley on Torts*, 436.

<sup>3</sup> "The sheriff by a levy acquires the legal property in the goods. He may maintain an action against the defendant and all other persons. When the executions are satisfied any goods which may remain in the sheriff's hands, are revested in the

defendant, or an other person to whom he may have assigned his right. To one of these the sheriff is liable for a redelivery of such goods; and to meet that liability must have an action against a wrongful taker." *Weatherby v. Covington*, 8 Strob. (S. C.) 27, 49 Am. Dec. 628.

<sup>4</sup> Sheriff by levy on goods acquires special property in them by virtue of which he may maintain trover. *Wil-liams v. Herndon*, 13 B. Mon. (Ky.) 484, 54 Am. Dec. 551; *Weatherby v. Covington*, 8 Strob. (S. C.) 27, 49 Am. Dec. 628; *Brewster v. Vail*, 1 Spencer (N. J.) 56, 38 Am. Dec. 547; *Dezell v. Odell*, 3 Hill (N. Y.) 215, 38 Am. Dec. 628; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; *Badlam v. Tucker*, 1 Pick. (Mass.) 889, 11 Am. Dec. 302; *Fitch v. Dunn*, 8 Blackf. (Ind.) 142; *Wilbraham v. Snow*, 2 Saund. 47; *Clark v. Withers*, 6 Mod. 292.

Whether the true owner when sued may set up his title in defense to the action by the officer, has been both affirmed<sup>1</sup> and denied.<sup>2</sup>

§ 892. When Officer must sue in Name of his Office.—It has been laid down as a general rule that where the plaintiff sues for anything relating to his office he ought to name himself by the name of his office, or otherwise it may be pleaded in abatement.<sup>3</sup> But this rule, it has been said,<sup>4</sup> “will be found to extend only to such actions as are peculiar to the office or special character of the plaintiff, and where the very statement of the cause of action shows that it is an action that can be brought only by some dignitary or officer, or some person holding a special character. For instance, an action for a rescue can only be brought by a sheriff, and he must therefore call himself sheriff. So a real action for lands belonging to a prebend can only be brought by the prebendary. So if a prior, being parson of D., sues for a matter appertaining to that church, he must call himself parson, for none other can bring such action. Whereas any man, who has property in himself as an individual, either general or special, may bring trover, in his own name, whether he acquired that property, as purchaser, as a common carrier, as special bailee, or in the discharge of his duty as a sheriff or other public officer. It can never be necessary, in an action of trover, for a plaintiff to set out the history of his title or the office he bears, unless the property sued for belongs to that office; or unless he sues in *autre droit*.”

#### IV.

##### RIGHT OF ACTION UPON BONDS AND OTHER CONTRACTS.

§ 893. Have implied Right to bring necessary Actions.—Where the law has not created prohibitions, public officers have an implied authority to bring and maintain all suits, as incident to their office, which the proper and faithful discharge of the

<sup>1</sup> *Merritt v. Miller*, 18 Vt. 416.

<sup>2</sup> *Weidensaul v. Reynolds*, 49 Penn. St. 78.

<sup>3</sup> *Com. Dig. tit. Abatement, E. 21.*

<sup>4</sup> By HORNBLOWER, C. J., in *Brewster v. Vall*, 1 Spencer (N. J.) 56, 38 Am. Dec. 547.



duties of the office requires. Their right, in this respect, is commensurate with their public trusts and duties.<sup>1</sup>

§ 894. **Right to sue in his own Name on Bonds.**—It is frequently provided by law that the official bonds of inferior officers, and bonds given for the faithful performance of contracts and the like, shall be executed to some superior officer by his official title. Actions upon such bonds are usually also regulated by statute, and it is not infrequently provided that suits shall be brought thereon by the then incumbent of the office for the benefit of the persons interested.

Where, however, no such provision is made, it is the general rule that the action must be brought in the name of the Commonwealth, State, or other government having the legal interest in the bond,<sup>2</sup> or in the name of the present incumbent of the office named, and that the officer can not maintain the action in his own name,<sup>3</sup> nor can it be maintained in his name after his term of office has expired.<sup>4</sup>

§ 895. **Same Subject—Officer suing should sue by his official Title.**—But where the officer is authorized to sue he should sue in his own name with the addition of his official title. He should not ordinarily sue either in his own name alone<sup>5</sup> or in the name of the office alone.<sup>6</sup> Errors in this respect, however, may usually be cured by amendment or may be waived by the pleadings.<sup>7</sup>

<sup>1</sup> *Overseers of Pittstown v. Overseers of Plattsburgh*, 18 Johns. (N. Y.) 407; *Supervisor v. Stimson*, 4 Hill (N. Y.) 186; *Todd v. Birdsall*, 1 Cow. (N. Y.) 260; *Haynes v. Butler*, 30 Ark. 69; *Berrien County Treasurer v. Bunbury*, 45 Mich. 79; *Commissioners v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 483.

<sup>2</sup> *Inhabitants of Northampton v. Elwell*, 4 Gray (Mass.) 81; *Bissell v. Spencer*, 9 Conn. 267, 23 Am. Dec. 336; *State v. New London*, 22 Conn. 170.

<sup>3</sup> *Bagby v. Baker*, 18 Ala. 653.

<sup>4</sup> *Jansen v. Ostrander*, 1 Cow. (N. Y.) 870; *Armine v. Spencer*, 4 Wend. (N. Y.) 406; *Bagby v. Baker*, 18 Ala. 653.

When bond runs to The People,

the action should be in that name. *Lawton v. Erwin*, 9 Wend. (N. Y.) 233.

That officer may sue in his own name when he is the party legally interested, see *Hunnicut v. Kirkpatrick*, 39 Ark. 172; *Haynes v. Butler*, 30 Ark. 69.

<sup>5</sup> *Bagby v. Baker*, 18 Ala. 653.

<sup>6</sup> *Commissioners v. Peck*, 5 Hill (N. Y.) 215; *Supervisors v. Stimson*, 4 Hill (N. Y.) 186; *Overseers v. Ely*, *Lalor's Sup.* (N. Y.) 379; *Agent v. Rikeman*, 1 Denio (N. Y.) 279; *Berrien County Treasurer v. Bunbury*, 45 Mich. 79; *Commissioners v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 483.

<sup>7</sup> *Berrien County Treasurer v. Bun*

§ 896. Officer can not sue in his own Name on simple Contracts made in behalf of Public.—As has been seen, it is the presumption that public officers while acting in the public behalf do not intend to bind themselves personally, and they will only be held to be so bound where the intent is clear so to charge them.<sup>1</sup> But the rights and liabilities are reciprocal, and where the public is bound by the contract, it is entitled to enforce it.<sup>2</sup> It is, therefore, the general rule, to use the language of a Minnesota judge, that “Where a public officer, acting solely on behalf of his government, within the scope of his authority, enters into a contract or performs any official act, if his official character in the transaction is known presumptively or in fact to the other party, a suit thereon must be brought in the name of the government when the redress is sought in its behalf; and a suit in the name of the officer in the absence of express authority, cannot be maintained.”<sup>3</sup>

Thus upon a note running to I. E. F., “United States Indian Agent, his successors in office or order,”<sup>4</sup> or to J. I., “State’s Agent or his successor in office,”<sup>5</sup> or to J. I., “Land Agent of Maine, or order,”<sup>6</sup> the payee may not recover in his own name.

bury, 45 Mich. 79; *Johr v. Supervisors*, 88 Mich. 532; *Agent v. Rikeman*, 1 Denio (N. Y.) 279.

<sup>1</sup> See *ante*, § 805, *et seq.*

<sup>2</sup> See *Mechem on Agency*, § 769.

<sup>3</sup> Per *McMILLAN, J.*, in *Balcombe v. Northrup*, 9 Minn. 172.

<sup>4</sup> *Balcombe v. Northrup*, 9 Minn. 172.

<sup>5</sup> *Irish v. Webster*, 5 Me. 171.

<sup>6</sup> *State v. Boles*, 11 Me. 474.

## CHAPTER XI.

### OF THE LIABILITY OF THE PARTY WHO SETS THE OFFICER IN MOTION.

#### § 897. Purpose of this Chapter.

##### I. IN CASE OF JUDICIAL OFFICERS.

##### 898. In general.

899. Not liable for judicial Action of Court of general Jurisdiction.

900. Liable for setting inferior Magistrate in Motion without Jurisdiction.

901. Liability for causing Proceedings under unconstitutional Statute.

902. Liable for setting Magistrate in Motion on false Showing.

903. Liable for malicious Prosecution.

##### II. IN CASE OF MINISTERIAL OFFICERS.

904. No Liability for employing Officer to do lawful Act.

905. But Party is liable who authorizes, directs or participates in an unlawful Act.

906. Same Subject—Liability for false Imprisonment.

907. Same Subject—Effect of Ratification.

§ 897. Purpose of this Chapter.—It is not within the scope of this work to go minutely into the liability of the persons upon whose motion or at whose request the officer acts; that subject belongs more appropriately to a treatise on the law of torts. At the same time, some consideration of the question is deemed material to a complete view of the whole relation and its consequences, and will be given. The liability resulting from setting in motion judicial and ministerial officers will be separately considered.

#### I.

##### IN CASE OF JUDICIAL OFFICERS.

§ 898. In general.—It is the right of every individual believing himself to have a lawful cause of action against another to appeal to the proper court for its enforcement; and though his

belief may prove groundless, he incurs no liability to respond in damages to the party prosecuted.<sup>1</sup>

So it is not only the right but the duty of every individual who, in good faith and with probable cause, believes that a public offense has been committed by another to institute the proper proceedings for the punishment of the supposed offender; and though the prosecution should fail, the complainant incurs no liability to the defendant.<sup>2</sup>

§ 899. **Not liable for judicial Action of Court of general Jurisdiction.**—So where an individual goes before a court or officer having general jurisdiction over the subject-matter, and in good faith lays before the court or magistrate the facts in respect to the supposed cause of action or offense, and the court or magistrate thereupon decides that there is authority to act and does so, the person thus setting the court or magistrate in motion can not be held to respond in damages if the action proves to have been unauthorized.<sup>3</sup> This, as has been seen, is judicial action<sup>4</sup> and protects both the magistrate and the party who set him in motion.

§ 900. **Liable for setting inferior Magistrate in Motion without Jurisdiction.**—The same immunity extends to actions before inferior courts and magistrates where they have jurisdiction, or where, when the jurisdiction depends upon the showing, there is evidence laid before the magistrate having a legal tendency to make out a case in all its parts within his jurisdiction.<sup>5</sup>

<sup>1</sup> Cooley on Torts, 180.

<sup>2</sup> Cooley on Torts, 180.

<sup>3</sup> West v. Smallwood, 8 M. & W. 418; Fischer v. Langbein, 103 N. Y. 84; Hahn v. Schmidt, 64 Cal. 284; Landt v. Hiltz, 19 Barb. (N. Y.) 283; Marks v. Townsend, 97 N. Y. 590; Miller v. Adams, 7 Lans. 183, 52 N. Y. 409; Dusy v. Helm, 59 Cal. 188; Murphy v. Walters, 84 Mich. 180; Fenelon v. Butts, 49 Wis. 842; Von Latham v. Rowan, 17 Abb. Pr. 237; Von Latham v. Libby, 88 Barb. (N. Y.) 339; Carratt v. Morley, 1 A. & E. (N. S.) 18; Brown v. Chapman, 6 M.

G. & S. 365; Langford v. Boston, &c. R. Co. 144 Mass. 431.

<sup>4</sup> See *ante*, § 619, *et seq.*

<sup>5</sup> The rule upon this subject stated by BRANSON, C. J., in *Miller v. Brinkerhoff*, 4 Denio (N. Y.) 118, 47 Am. Dec. 242, has been quite generally approved. He said: "When certain facts are to be proved to a court of special and limited jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. \* \* But when

But where the party sets the magistrate in motion to do an act which he has no authority to do—as to which there is a total lack or excess of jurisdiction,<sup>1</sup>—or where he sets him in motion with an entire lack of evidence of some material fact which the law requires to be shown,<sup>2</sup> or without compliance with the conditions precedent which the law prescribes,<sup>3</sup> he will be held liable for an injury thereby occasioned.

§ 901. **Liability for causing Proceedings under unconstitutional Statute.**—A party who procures the issuance and execution of a warrant under an unconstitutional statute is liable to the injured party in damages;<sup>4</sup> but it has been held that one

the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid, until set aside by a direct proceeding for that purpose. In one case, the court acts without authority; in the other, it only errs in judgment upon a question properly before it for adjudication: *Matter of Faulkner*, 4 Hill (N. Y.) 598; *Harman v. Brotherson*, 1 Denio (N. Y.) 587; *Vosburgh v. Welch*, 11 Johns. (N. Y.) 175; *Tallman v. Bigelow*, 10 Wend. (N. Y.) 420. In one case, there is a defect of jurisdiction; in the other, there is only an error of judgment. Want of jurisdiction makes the act void; but a mistake concerning the just weight and importance of evidence only makes the act erroneous, and it will stand good until reversed."

See to like effect and approving this rule, *Staples v. Fairchild*, 8 N. Y. 41; *Johnson v. Maxon*, 28 Mich. 129, 187; *Dusy v. Helm*, 59 Cal. 188, 190; *Gillett v. Thiebold*, 9 Kans. 427; *Skinning v. Kelly*, 18 N. Y. 355; *Outlaw v. Davis*, 27 Ill. 466.

<sup>1</sup> "Where a party procures an inferior magistrate to exceed his jurisdiction, and extend his powers to a

case to which they can not lawfully be extended, he becomes a trespasser, and is amenable to the party injured." *Barkeloo v. Randall*, 4 Blackf. (Ind.) 476, 32 Am. Dec. 46, citing *Curry v. Pringle*, 11 Johns. (N. Y.) 444. See also *Painter v. Ives*, 4 Neb. 123.

Party is liable for sale upon execution which he caused to be issued on a void judgment: *Gunz v. Heffner*, 33 Minn. 215.

<sup>2</sup> *Swart v. Kimball*, 43 Mich. 443; *Crumpton v. Newman*, 12 Ala. 199, 46 Am. Dec. 251; *Hauss v. Kohlar*, 25 Kans. 640 (citing *Spice v. Steinruck*, 14 Ohio St. 213; *Von Kettler v. Johnson*, 57 Ill. 109; *Johnson v. Von Kettler*, 66 Ill. 63; *Gorton v. Frizzell*, 20 Ill. 292; *Proctor v. Prout*, 17 Mich. 473; *Cody v. Adams*, 7 Gray (Mass.) 59; *Hall v. Rogers*, 2 Blackf. (Ind.) 439; *Taylor v. Moffatt*, 2 Id. 305; *Painter v. Ives*, 4 Neb. 123; *Gillett v. Thiebold*, 9 Kans. 427; *Prell v. McDonald*, 7 Kans. 426; *Bauer v. Clay*, 8 Kans. 580).

<sup>3</sup> *Diehl v. Friester*, 37 Ohio St. 473; *Barkeloo v. Randall*, 4 Blackf. (Ind.) 476, 32 Am. Dec. 46; *Hauss v. Kohlar*, 25 Kans. 640.

<sup>4</sup> *Merritt v. City of St. Paul*, 11 Minn. 233.

who, in good faith and with probable cause, merely make a complaint to the magistrate is not liable in trespass for the acts done under the warrant which the magistrate thereupon issues though the statute, under which the complaint is made and upon which the magistrate proceeds to act, is unconstitutional.<sup>1</sup> The magistrate and the officer, however, would be liable.<sup>2</sup>

§ 902. **Liable for setting Magistrates in Motion on false Showing.**—So a party is liable who sets the judicial officer in motion upon a false statement of facts which, if true, would have been sufficient to confer jurisdiction and to justify the proceedings.<sup>3</sup>

§ 903. **Liable for malicious Prosecution.**—Clearly, also, is the party liable who, maliciously and without probable cause, institutes proceedings against another.<sup>4</sup> To maintain an action for a malicious prosecution, three distinct propositions must be established:

*First.* The fact of the alleged prosecution and that it has come to a legal termination in the plaintiff's favor.

*Second.* That the defendant had not probable cause.

*Third.* That he acted from malicious motives.<sup>5</sup>

The full exposition of these several requirements is beyond the scope of this volume, but it will be found in the excellent treatises on torts of Judge COOLEY and Mr. Bishop.

<sup>1</sup> *Barker v. Stetson*, 7 Gray (Mass.) 53, 66 Am. Dec. 457.

<sup>2</sup> *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Kelly v. Bemis*, 4 Gray (Mass.) 83, 64 Am. Dec. 50; *Barker v. Stetson*, 7 Gray (Mass.) 53, 66 Am. Dec. 457.

<sup>3</sup> *Connelly v. Woods*, 31 Kans. 359; *Ogg v. Murdock*, 25 W. Va. 139; *Ex parte Thompson*, 1 Flippin, C. C. 507; *Dennis v. Ryan*, 65 N. Y. 385, 23 Am. Rep. 635.

<sup>4</sup> *Forrest v. Collier*, 20 Ala. 175, 56 Am. Dec. 190; *Brown v. Randall*, 36

Conn. 56, 4 Am. Rep. 35; *Cardinal v. Smith*, 109 Mass. 158, 12 Am. Rep. 683; *Shaul v. Brown*, 28 Iowa 37, 4 Am. Rep. 151; *Galloway v. Stewart*, 49 Ind. 156, 19 Am. Rep. 677; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Glosson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316; *McCardle v. McGinley*, 36 Ind. 533, 44 Am. Rep. 343; *Graves v. Dawson*, 180 Mass. 78, 39 Am. Rep. 439; *Hatch v. Cohen*, 84 N. C. 602, 37 Am. Rep. 630.

<sup>5</sup> *Hamilton v. Smith*, 39 Mich. 223; *Cooley on Torts*, 181.

## II.

## IN CASE OF MINISTERIAL OFFICERS.

## § 904. No Liability for employing Officer to do lawful Act.—

It is the right of every one, having lawful occasion, to avail himself of the services of a public ministerial officer authorized by law to perform the desired act at the time and under the circumstances given. It is the presumption of the law that the officer not only understands his duty, but will perform it in the manner and with the precautions which the law prescribes. No one can complain of the lawful doing of that which the person doing it or causing it to be done had a legal right to do. No liability, therefore, can attach to one who, in a lawful manner, merely sets a public officer in motion to perform a lawful act within the scope of his authority. If the officer, in the course of his performance, commits a trespass or does any other unauthorized act, he alone must answer for it, and his employer, who neither authorized nor ratified it, can not be held liable.<sup>1</sup>

§ 905. But Party is liable who authorizes, directs or participates in an unlawful Act.—But, on the other hand, the party is liable where he authorizes, encourages, directs or assists the officer to do an unlawful act, or to do a lawful act in an unlawful manner, or to abuse, exceed or disregard his duty or authority; as where he directs the service of void process, or the arrest of

<sup>1</sup> Thus, says CAMPBELL, C. J., in *Sutherland v. Ingalls*, 68 Mich. 690, 6 Am. St. Rep. 382, "No one can be held liable as a trespasser at all for employing an officer to execute lawful process. It is the right of every one to have his regular and valid writ served and enforced. The officers of the law are bound to perform that duty, and can not be blamed for doing it in a legal manner. Every one has a right to suppose the ministers of the law will not abuse their functions, and no one who lawfully employs them is liable if they do: *Michels v. Stork*, 44 Mich. 2. It is only where the party himself orders

or encourages lawlessness that he can be treated as a joint wrong-doer, and then he is liable because he is actually a trespasser, and liable to the extent of his own misconduct."

See also *Wilson v. Tumman*, 6 M. & G. 244; *Whitmore v. Greene*, 18 M. & W. 104; *Walley v. McConnell*, 13 A. & E. (N. S.) 911; *Averill v. Williams*, 1 Denio (N. Y.) 501, 4 Ed. 295, 47 Am. Dec. 252; *Abbott v. Kimball*, 19 Vt. 551, 47 Am. Dec. 708; *Perrin v. Claffin*, 11 Mo. 18; *Princeton Bank v. Gibson*, 20 N. J. L. 188; *Snively v. Fahnestock*, 18 Md. 891; *Clay v. Sandefer*, 12 B. Mon. (Ky.) 384; *Welsh v. Cochran*, 68 N. Y. 181, 20 Am. Rep. 519.

a privileged person, or the seizure of exempt goods or the goods of a third person, or directs the refusal of lawful bail, or procures an arrest without process, or counsels, causes, directs or participates in the doing of any other act which the process or authority of the officer will not legally justify.<sup>1</sup>

§ 906. **Same Subject—Liability for false Imprisonment.**—The liability of the party in these cases most frequently arises in actions for false imprisonment, and, in accordance with the rule of the last section, it is well settled that whoever, whether it be a natural person or a corporation,<sup>2</sup> in person or by agent,<sup>3</sup> and

<sup>1</sup> *Bonesteel v. Bonesteel*, 28 Wis. 245, 30 *Id.* 511; *Gibbs v. Randlett*, 58 N. H. 407; *Develing v. Sheldon*, 88 Ill. 890: Plaintiff in execution is equally liable with officer for abuse of process by the latter if he commands or advises such abuse; and he is liable in trespass for his act, not only where the proceedings are irregular, or where the court had no jurisdiction, but also in a case where all the proceedings are regular, and where he would not, except for such abuse, incur liability: *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. Party's participation in an unlawful sale upon execution will render him liable with the officer: *Deal v. Bogue*, 20 Penn. St. 228, 57 Am. Dec. 702. Party is liable where he directs the levy of an execution upon the goods of a stranger to the writ: *Allen v. Crary*, 10 Wend. (N. Y.) 349, 25 Am. Dec. 586; *Corner v. Mackintosh*, 48 Md. 374; *Tompkins v. Halle*, 3 Wend. (N. Y.) 406; or where, after a levy by the officer, he refuses to permit the property to be restored to its owner, a stranger to the writ: *Cook v. Hopper*, 33 Mich. 511; *Root v. Chandler*, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546.

"When an execution is issued on a judgment to an officer by law authorized to execute it, he must execute it

as commanded in the writ, and in the manner provided by law, and will be liable to any person or party aggrieved if he fails to do so. But if the plaintiff in the execution directs that it be executed in a different manner, and the officer so executes it, he makes the officer his own agent, and is bound by whatever is done or omitted by the officer by his direction; and if the plaintiff directs the officer to levy on certain personal property, to satisfy the execution, which belongs to a stranger to the judgment, or is not subject to levy and sale, or is issued upon a void judgment, and the officer take it, both are trespassers, and he is equally liable with the officer in an action for the wrongful taking of the property, and the owner of it may maintain his action against the plaintiff who directed the levy or sale, or against the officer, or against both together:" *Shaw v. Rowland*, 83 Kans. 154. Party is liable where he directs the officer to refuse proper bail offered: *Gibbs v. Randlett*, 58 N. H. 407.

<sup>2</sup> *Wheeler & Wilson Mfg. Co. v. Boyce*, 86 Kans. 350, 59 Am. Rep. 571; *Owsley v. Montgomery R. R. Co.* 37 Ala. 560; *Lynch v. Metropolitan Ry. Co.* 90 N. Y. 77, 43 Am. Rep. 141.

<sup>3</sup> *Wheeler & Wilson Mfg. Co. v. Boyce*, 86 Kans. 350, 59 Am. Rep.



whether personally present or not, directs, procures or participates in the unlawful and unauthorized arrest and imprisonment of another is liable in damages to the party injured.<sup>1</sup>

§ 907. **Same Subject—Effect of Ratification.**—But it is not alone where the wrongful act of the officer was previously authorized or directed by the party that he is liable; he may become liable where, after the act has been committed, he ratifies and confirms it.

But here, as in other cases,<sup>2</sup> the rule applies that, except in those cases in which the party intentionally assumes the responsibility without inquiry,<sup>3</sup> or deliberately ratifies having all the knowledge in respect to the act which he cares to have,<sup>4</sup> it must appear that the person ratifying did so with full knowledge of all of the material facts relating to the transaction; otherwise any alleged ratification will be unavailing.<sup>5</sup>

So the evidence of the ratification must be clear and explicit, and such as indicates the intention of the party, after full knowledge of the facts, to adopt the act as his own.<sup>6</sup>

An express ratification, however, is not requisite, but it may be inferred, in this as in other cases, from such acts or omissions

571; *Harris v. Louisville, &c. R. R. Co.* 85 Fed. Rep. 116.

<sup>1</sup> *Floyd v. State*, 12 Ark. 48, 54 Am. Dec. 250; *Chapman v. Dyett*, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598; *Emery v. Hapgood*, 7 Gray (Mass.) 55, 66 Am. Dec. 459; *Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487; *Allison v. Rheam*, 8 Serg. & R. (Penn.) 189, 8 Am. Dec. 644; *Fotheringham v. Adams Express Co.* 86 Fed. Rep. 252; *Harris v. Louisville, &c. R. R. Co.* 35 Fed. Rep. 116; *McGarrahan v. Lavers*, 15 R. L. 302; *Wheeler & Wilson Mfg. Co. v. Boyce*, 86 Kans. 350, 59 Am. Rep. 571; *Clifton v. Grayson*, 2 Stew. (Ala.) 412; *Stoddard v. Bird*, Kirby (Conn.) 65; *Burlingham v. Wylee*, 2 Root (Conn.) 152; *Stoyel v. Lawrence*, 8 Day (Conn.) 1; *Vredenburg v. Hendricks*, 17 Barb. (N. Y.)

179; *Curry v. Pringle*, 11 Johns. (N. Y.) 444; *Winslow v. Hathaway*, 1 Pick. (Mass.) 211; *Cody v. Adams*, 7 Gray (Mass.) 59; *Bright v. Patton*, 5 Mackey (D. C.) 534.

<sup>2</sup> See *Mechem on Agency*, §§ 109-182. See also full discussion, § 536, *et seq.*

<sup>3</sup> *Lewis v. Read*, 18 M. & W. 834.

<sup>4</sup> *Kelley v. Newburyport Horse R. Co.*, 141 Mass. 496.

<sup>5</sup> *Lewis v. Read*, 18 M. & W. 834; *Hyde v. Cooper*, 26 Vt. 552; *Tucker v. Jerris*, 75 Me. 184; *Adams v. Freeman*, 9 Johns. (N. Y.) 118.

<sup>6</sup> *Tucker v. Jerris*, 75 Me. 184; *Adams v. Freeman*, 9 Johns. (N. Y.) 118; *West v. Shockley*, 4 Harring. (Del.) 287; *Kreger v. Osborn*, 7 Blackf. (Ind.) 74; *Abbott v. Kimball*, 19 Vt. 531, 47 Am. Dec. 708.

as indicate the intention of the party to approve and confirm the act.<sup>1</sup>

Thus where the party expressly indemnifies the officer against the consequences of the act, he will be deemed thereby to ratify it.<sup>2</sup> And so he will where, knowing that the act was unauthorized, as if the goods of a stranger have been seized upon his execution, he refuses to permit the wrong to be made right, as by returning or releasing the goods;<sup>3</sup> and where, knowing the facts, he seeks to avail himself of the benefits of the unlawful act.<sup>4</sup>

But where the party has not authorized or directed the wrongful act, he will not be deemed to have ratified it merely by accepting from the officer what he would have been entitled to receive had the act been properly performed.<sup>5</sup> Nor will the party's mere omission to interpose to prevent the unauthorized act, amount to a ratification.<sup>6</sup>

<sup>1</sup> See *Mechem on Agency*, §§ 146-165.

<sup>2</sup> *Knight v. Nelson*, 117 Mass. 458; *Beveridge v. Rawson*, 51 Ill. 504; *Davis v. Newkirk*, 5 Denio (N. Y.) 93; *Ball v. Loomis*, 39 N. Y. 412; *Grossman v. Owen*, 62 Me. 528; *Root v. Chandler*, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546; *Herring v. Hoppock*, 15 N. Y. 409; *Lovejoy v. Murray*, 8 Wall. (U. S.) 1.

<sup>3</sup> *Cook v. Hopper*, 23 Mich. 511;

*Root v. Chandler*, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546.

<sup>4</sup> *Hyde v. Cooper*, 26 Vt. 552; *Snyder v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. Obtaining the issue and service of an execution upon goods unlawfully seized upon attachment ratifies the attachment: *Peterson v. Foll*, 67 Iowa 402.

<sup>5</sup> *Hyde v. Cooper*, 26 Vt. 552.

<sup>6</sup> *Hyde v. Cooper*, 26 Vt. 552.

## CHAPTER XII.

## OF THE RIGHTS OF THE PUBLIC AGAINST THE OFFICER.

§ 908. In general.

## I. DUTY TO ACCOUNT FOR PUBLIC FUNDS.

909. In general.

910. At what time Officer should account.

911. When Officer chargeable with Interest.

912. Extent of Liability under Statutes and Bonds, and Excuses for Defaults.

§ 912. Same Subject — Legislature may relieve Officer from his Liability.

914. When Action may be begun.

915. Can not set up Illegality of Transaction to defeat Right to an Accounting.

## II. DUTY TO ACCOUNT FOR PUBLIC PROPERTY.

916. Nature and Extent of the Duty.

§ 908. In general.—The rights of the public, viewed collectively, against the officer are numerous and many of them obvious. It has a right to insist that he shall do his duty,—that he will be faithful and honest, that he will protect and preserve the rights and interests entrusted to his care, that he will exercise due diligence and wisdom in the exercise of his functions, that he will enforce the prerogatives and observe the limitations which the law attaches to his office, and that, upon the expiration of his term, he will surrender his trust with all of its rights and incidents to him who has been lawfully chosen to succeed him.

Remedies of various kinds for the enforcement of these rights exist, in the power of removal, of impeachment, and of the election of a successor. These, however, are for consideration in another place.

Certain other rights growing out of the agency relation of the officer and the public exist, and are here to be considered. These, chiefly, are, 1. The duty of the officer to account for moneys received; and, 2. The duty of the officer to account for public property.

## I.

## DUTY TO ACCOUNT FOR PUBLIC FUNDS.

§ 909. **In general.**—It is the duty of the public officer, like any other agent or trustee, although not declared by express statute, to faithfully account for and pay over to the proper authorities all moneys which may come into his hands upon the public account, and the performance of this duty may be enforced by proper actions against the officer himself, or against those who have become sureties for the faithful discharge of his duties.

§ 910. **At what Time Officer should account.**—Where, by the law creating the office or otherwise, the time for accounting is expressly fixed, that provision would, of course, govern. Where, however, no such time has been fixed, it would be the duty of the officer, ordinarily, in analogy with that of a private agent,<sup>1</sup> to account upon lawful demand, and, at all events, within a reasonable time.<sup>2</sup>

§ 911. **When Officer chargeable with Interest.**—A public officer who duly accounts for public funds at the proper time would not, unless by express statute or special agreement, be chargeable with interest thereon. But if he makes default in payment at the proper time,<sup>3</sup> or omits to include a portion in his account,<sup>4</sup> or appropriates it to his own use,<sup>5</sup> or retains it for an unreasonable time,<sup>6</sup> he will be liable for interest upon the amount retained from the time when it should have been paid.<sup>7</sup>

§ 912. **Extent of Liability under Statutes and Bonds, and Excuses for Defaults.**—But the nature and extent of the liability in this respect is usually prescribed by express statutes, and bonds are required to secure the faithful performance of the duty. In determining the extent of the liability, therefore, regard must be had to these instruments which declare it.<sup>8</sup>

<sup>1</sup> See Mechem on Agency, § 580.

<sup>2</sup> Leake v. Sutherland, 25 Ark. 219.

<sup>3</sup> State v. Sooy, 10 Vroom (N. J.) 589.

<sup>4</sup> Supervisors v. Birdsall, 4 Wend. (N. Y.) 458.

<sup>5</sup> People v. Gasherle, 9 Johns. (N. Y.) 71.

<sup>6</sup> Board of Justices v. Fennimore, Cox (N. J.) 242.

<sup>7</sup> State v. Van Winkle, 48 N. J. L. 125.

<sup>8</sup> See full discussion, § 297-308.

Under some of these statutes, the money becomes, upon its payment to the officer, in legal effect his money, and he becomes a debtor to the public for the amount of it.<sup>1</sup> In such a case it is obvious that his liability is absolute, and, like any other debtor, he must repay although he may have been so unfortunate as to lose or be deprived of the money without his fault.<sup>2</sup>

In most cases, however, it is made the duty of the officer, either by the terms of the statute prescribing his duties, the performance of which the bond, in general terms, is given to secure, or by the very language of the bond itself, to safely keep the public funds which come into his hands and to pay them over according to law. In a few instances it is further provided that they shall be deposited in a certain manner or shall be kept in certain safes or other receptacles provided by the public; in which cases the officer who complies with the requirements is relieved from liability.<sup>3</sup>

But, except in such instances, the officer's liability is, according to the great majority of the decisions, held to be fixed by the terms of the statute or the language of the bond, and he is regarded not as a mere bailee, but as one who, by the terms of his undertaking, has incurred a fixed and absolute liability to keep the money safely at all hazards.<sup>4</sup>

<sup>1</sup> *Perley v. County of Muskegon*, 82 Mich. 182, 20 Am. Rep. 687.

<sup>2</sup> *Muzzy v. Shattuck*, 1 Denio (N. Y.) 288; (See *Supervisors v. Dorr*, 25 Wend. (N. Y.) 440;) *Colerain v. Bell*, 9 Metc. (Mass.) 499; *Hancock v. Hazard*, 12 Cush. (Mass.) 112, 59 Am. Dec. 171; *Egremont v. Benjamin*, 125 Mass. 19; *Agawam National Bank v. South Hadley*, 128 Mass. 507; *Halbert v. State*, 22 Ind. 181; *Allen v. State*, 6 Blackf. (Ind.) 252; *Morbeck v. State*, 28 Ind. 86; *Rock v. Stinger*, 86 Ind. 846; *Steinback v. State*, 88 Ind. 433; *Board of Justices v. Fennimore*, Coxe (N. J.) 242; *Inglis v. State*, 61 Ind. 212; *Shelton v. State*, 53 Ind. 381, 31 Am. Rep. 197; *New Providence v. McEachron*, 83 N. J. L. 339.

<sup>3</sup> But this could only be where the law was established by competent authority. Otherwise the mere fact that the money was kept in a safe provided by the public would be no defence. *Halbert v. State*, 22 Ind. 181; *Cumberland v. Pennell*, 69 Me. 357, 81 Am. Rep. 284; *Jefferson County v. Lineberger*, 8 Mont. 231, 35 Am. Rep. 463.

<sup>4</sup> The leading case upon this subject in United States v. Prescott, 3 How. (U. S.) 578. There a receiver of public money had given a bond conditioned, among other things, that he would "well, truly and faithfully keep safely all the public moneys collected by him," &c. He sought to justify a default upon the ground that the money had been

Thus a county or township treasurer or other receiver of public moneys, is not discharged from liability by the failure of a bank in which he had deposited the funds, though he was guilty of no negligence in ascertaining its financial condition,<sup>1</sup> and although the county provided no safe place for its deposit;<sup>2</sup> or by being violently robbed of it;<sup>3</sup> or by its being stolen from the county

stolen from him without his fault. But the court held that this was no defence, and McLEAN, J., of the United States Supreme Court, said, in language which has been quoted: "This is not a case of bailment, and, consequently the law of bailment does not apply to it. The liability of the defendant arises out of his official bond, and principles which are founded upon public policy. \* \* \* The obligation to keep safely the money is absolute, without any condition, express or implied, and nothing but the payment of it, when required, can discharge the bond. \* \* \* Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he 'should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public. No such principle has been recognized or admitted as a legal defence. \* \* \* As every depositary receives the office with a full knowl-

edge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."

This case has been followed with approval in many others: *United States v. Morgan*, 11 How. (U.S.) 154; *United States v. Dashiell*, 4 Wall. (U.S.) 183; *United States v. Keebler*, 9 Wall. (U.S.) 88; *Boyden v. United States*, 18 Wall. (U.S.) 17; *Bevans v. United States*, 18 Wall. (U.S.) 56; *District Township of Taylor v. Morton*, 37 Iowa 555; *District Township of Union v. Smith*, 89 Iowa 9, 18 Am. Rep. 39; *State v. Moore*, 74 Mo. 418, 41 Am. Rep. 822; *Jefferson County v. Lineberger*, 8 Mont. 281, 85 Am. Rep. 463; *Commonwealth v. Comly*, 3 Penn. St. 372; *Lowry v. Polk County*, 51 Iowa 50, 33 Am. Rep. 114; *State Township v. Powell*, 67 Mo. 935, 29 Am. Rep. 512; *Ward v. School District*, 10 Neb. 293, 85 Am. Rep. 477; *Wilson v. Wichita County*, 67 Tex. 647; *State v. Harper*, 6 Ohio St. 610, 67 Am. Dec. 863; *State v. Nevin*, 19 Nev. 163, 3 Am. St. Rep. 873; *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59.

<sup>1</sup> *State v. Moore*, 74 Mo. 418, 41 Am. Rep. 822; *State Township v. Powell*, 67 Mo. 395, 29 Am. Rep. 512; *Wilson v. Wichita County*, 67 Tex. 647; *Ward v. School District*, 10 Neb. 293, 85 Am. Rep. 477.

<sup>2</sup> *Lowry v. Polk County*, 51 Iowa 50, 33 Am. Rep. 114.

<sup>3</sup> *United States v. Prescott*, 3 How.

safe without any lack of care upon his part ;<sup>1</sup> or by the destruction of the money without his fault.<sup>2</sup>

In a few cases, however, this absolute liability has been denied and the officer has been held to be excused by the act of God or the public enemy,<sup>3</sup> or by losses occurring without fault upon his part.<sup>4</sup>

§ 913. **Same Subject—Legislature may relieve officer from his Liability.**—But although the officer may be liable to make good the loss, though happening without his fault, it is competent for the legislature to relieve him from this liability, and authorize the deficiency to be made up by levying a tax for that purpose.<sup>5</sup>

§ 914. **When Action may be begun.**—The right to institute an action upon the officer's bond will ordinarily arise only when, by the terms of the bond or the provisions of law, his duty to account has matured and he has made default. This may be at the end of his term or at varying intervals before, according to the circumstances.

But where the officer admits the defalcation but claims the right to interpose an untenable defense, it is held that the State is not compelled to wait until the close of the officer's term before beginning an action upon the bond.<sup>6</sup>

(U.S.) 578; *State v. Nevin*, 19 Nev. 162, 3 Am. St. Rep. 873; *State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 368.

<sup>1</sup> *Jefferson County v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462.

<sup>2</sup> *District Township of Union v. Smith*, 39 Iowa 9, 18 Am. Rep. 39. See *ante*, §§ 297-303.

<sup>3</sup> Thus in *United States v. Thomas*, 15 Wall. (U. S.) 837, it was held that a receiver of public money who had given a bond to keep it safely and pay it when required, is not bound absolutely, but is discharged if it be lost by the act of God or the public enemy—in this case the Confederate army.

The decision in *United States v. Prescott*, 8 How. (U. S.) 587, was very much weakened by *United States v. Thomas*, *supra*, if not, so

far as it held to the rule of unconditional liability, overruled.

<sup>4</sup> Thus in an elaborately reasoned case in Maine it is held that a county treasurer is not liable for public moneys of which he has been violently robbed without his fault. *Cumberland v. Pennell*, 69 Me. 357, 31 Am. Rep. 384.

And in South Carolina a county treasurer was released from liability by the failure of a bank which was in good standing at the time of deposit. *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675.

<sup>5</sup> *Board of Education v. McLandsborough*, 36 Ohio St. 227, 38 Am. Rep. 533; *Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192.

<sup>6</sup> *State v. Nevin*, 19 Nev. 162, 3 Am. St. Rep. 873.

§ 915. Can not set up Illegality of Transaction or Defects in Title to defeat Right to an Accounting.—A public officer, like an agent, who has received money from, or in behalf of, his principal, can not defeat an action brought by the principal to recover it, upon the ground that the contract under which the money was paid, or the transaction from which it was realized, or the purpose to which it was to be devoted, was illegal.<sup>1</sup>

Thus a collector of taxes cannot deny the right of his principal to receive them on the ground that they were illegally levied;<sup>2</sup> an agent who in unlawful speculations has received money belonging to his principal can not refuse, on that ground, to pay it to him;<sup>3</sup> nor can an agent who has received money from his principal to be employed for an unlawful purpose, but who has not so employed it, refuse to return the money to his principal because of the illegality of the purpose contemplated.<sup>4</sup>

So a public officer who has received money from the State to be applied to a designated purpose can not defeat the right of the State to demand an account of it by showing that the title of the State to the money was defective.<sup>5</sup>

## II.

### DUTY TO ACCOUNT FOR PUBLIC PROPERTY.

§ 916. Nature and Extent of the Duty.—It is frequently the case that public officers, by virtue of their position, come into the possession of property, both real and personal, belonging to the public. Certain of this property, such as real estate occu-

<sup>1</sup> Snell v. Pells, 113 Ill. 145; Ohinn v. Ohinn, 23 La. Ann. 599; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140; Daniels v. Barney, 22 Ind. 207; Kiewert v. Rindskopf, 46 Wis. 481, 32 Am. Rep. 781; Brooks v. Martin, 2 Wall. (U. S.) 70; Gilliam v. Brown, 43 Miss. 641; Reed v. Dougan, 54 Ind. 307; Baldwin v. Potter, 46 Vt. 402; First National Bank v. Leppel, 9 Col. 594; Souhegan Bank v. Wallace, 61 N. H. 24.

See also DeLeon v. Trevino, 41

Tex. 88, 30 Am. Rep. 101, with criticisms in the note.

See also the cases next cited.

<sup>2</sup> Placer County v. Astin, 8 Cal. 808; Clark v. Moody, 17 Mass. 145; Hammond v. Christie, 5 Robt. (N. Y.) 160; Galbraith v. Gaines, 10 Lea (Tenn.) 568.

<sup>3</sup> Norton v. Blinn, 39 Ohio St. 145.

<sup>4</sup> Kiewert v. Rindskopf, 46 Wis. 481, 32 Am. Rep. 781.

<sup>5</sup> People v. Swineford, — Mich. —, 43 N. W. Rep. 929.



pied for public purposes, and the public books, records and furnishings form permanent appurtenances of the office, designed by law to be transmitted to his successor, and it is the officer's duty, therefore, upon the expiration of his term, to duly deliver them over to the public authority lawfully entitled to receive them.' Proceedings for the enforcement of this duty are usually provided by law,<sup>1</sup> and its violation is made a criminal offense.

While in the possession of such property, it is the duty of the officer to keep and preserve it with reasonable diligence and care. In this respect he stands in the attitude of a bailee, and unless he has expressly incurred an absolute liability by his bond or otherwise, he is not liable for a loss or destruction of the property without his fault.<sup>2</sup>

So where property comes into the possession of a public officer by reason of his official position and in accordance with the usage of his office, although it is not made by law the duty of his office to receive it, he owes a duty of ordinary care in the preservation of it, and occupies the position of a bailee in reference to it.

<sup>1</sup> Where the right to occupy a building is part of the officer's compensation, his right terminates with his term, and he may then be ousted. *Frazier v. Virginia Military Institute*, 81 Va. 59.

<sup>2</sup> See *McGee v. State*, 108 Ind. 444; *State v. Meeker*, 19 Neb. 444; *Huffman v. Mills*, 89 Kans. 577.

<sup>3</sup> *United States v. Thomas*, 15 Wall. (U. S.) 337, 342.

<sup>4</sup> *Phelps v. People*, 72 N. Y. 334.

## CHAPTER XIII.

### OF THE RIGHTS OF THE PUBLIC AGAINST THIRD PERSONS.

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| <p>§ 917. Purpose of this Chapter.</p> <p>918. Public may enforce Contracts made with its Officers and Agents.</p> <p>919. Same Subject—Undisclosed Principal.</p> <p>920. Public may recover Value of Goods sold by its Agents.</p> <p>921. Public may recover Money wrongfully paid out.</p> | <p>§ 922. Same Subject—How far Public may follow its Funds.</p> <p>923. Public may recover Property wrongfully disposed of.</p> <p>924. State not estopped by unauthorized Acts of its Officers.</p> <p>925. State entitled to Priority of Payment.</p> |
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§ 917. Purpose of this Chapter.—The rights of the public against third persons are numerous, and arise out of a great variety of considerations. It is, however, those only which arise out of the acts and dealings of third persons with the agents and officers of the public which it is proposed to consider here. In a large sense it is true, inasmuch as the public can deal with or act toward third persons only through the intervention of its officers and agents, that all of the rights of the public must fall under the classification given; but it is not in this largest sense that the subject is deemed germane to the purpose of this treatise.

§ 918. Public may enforce Contracts made with its Officers and Agents.—As has been seen, it is the constant presumption of the law that public officers and agents in their official dealings with third persons intend to bind the public by their acts and contracts rather than themselves personally. Unless, therefore, there appears a clear intention on the part of the officer to assume a personal obligation, his acts and contracts are held to be binding upon the public and not upon himself.<sup>1</sup> But the rights and obligations of the contract are usually reciprocal, and it is

<sup>1</sup> See *ante*, § 805.

well settled, as in the case of private agencies,<sup>1</sup> that, except in those cases where the contract is clearly with the officer personally, the State or other authority on whose behalf the contract was made may enforce it by proper actions brought in its own name.

Thus where a bill of exchange was endorsed to T., treasurer of the United States, the Supreme Court, in sustaining the right of the government to sue upon it in its own name, said: "There is a fitness that the public by its own officers should conduct all actions in which it is interested, and in its own name; and the inconveniences to which individuals may be exposed in this way, if any, are light when weighed against those which would result from its being always forced to bring an action in the name of an agent. Not only the death or bankruptcy of an agent may create difficulties, but set-offs may be interposed against the individual who is plaintiff, unless the court will take notice of the interest of the United States; and if they can do this to prevent a set-off, which courts of law have done, why not at once permit an action to be instituted in the name of the United States?"<sup>2</sup>

<sup>1</sup> See *Mechem on Agency*, §§ 768, 777. As to the right in case of private agents, see *Tutt v. Brown*, 5 *Littell* (Ky.) 1, 15 *Am. Dec.* 83; *Pitts v. Mower*, 18 *Ma.* 361; 36 *Am. Dec.* 737; *Gilpin v. Howell*, 5 *Penn. St.* 41, 45 *Am. Dec.* 720; *Girard v. Taggart*, 5 *S. & R. (Penn.)* 19, 9 *Am. Dec.* 327; *Arlington v. Hinds*, 1 *D. Chip. (Vt.)* 431, 12 *Am. Dec.* 704; *Bayley v. Onondaga Co. Mut. Ins. Co.* 6 *Hill* (N. Y.) 476, 41 *Am. Dec.* 759; *Violett v. Powell*, 10 *B. Mon. (Ky.)* 347, 52 *Am. Dec.* 548; *Ruiz v. Norton*, 4 *Cal.* 355, 60 *Am. Dec.* 618; *Ileley v. Merriam*, 7 *Cush. (Mass.)* 242, 54 *Am. Dec.* 721; *Eastern R. R. Co. v. Benedict*, 5 *Gray (Mass.)* 561, 66 *Am. Dec.* 884; *Taintor v. Prendergast*, 3 *Hill* (N. Y.) 72, 38 *Am. Dec.* 618; *Huntington v. Knox*, 7 *Cush. (Mass.)* 371; *Edwards v. Golding*, 20 *Vt.* 80; *Salmon Falls*

*Mnfg. Co. v. Goddard*, 14 *How. (U. S.)* 446; *Foster v. Smith*, 2 *Cold. (Tenn.)* 474, 38 *Am. Dec.* 604; *Winchester v. Howard*, 97 *Mass.* 303, 93 *Am. Dec.* 98; *Ford v. Williams*, 21 *How. (U. S.)* 287; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *Id.* 344, 381; *Woodruff v. McGehee*, 30 *Ga.* 158, *Ames v. St. Paul, &c., R. R. Co.* 12 *Minn.* 418; *Mildred v. Hermano*, 8 *App. Cases* 874, 36 *Eng. Rep. (Moak)* 97; *Norfolk v. Worthy*, 1 *Camp.* 337; *Wilson v. Hart*, 7 *Taunt.* 295; *Bickerton v. Burrell*, 5 *Maule & Sel.* 383; *Elkins v. Boston, &c., R. R.*, 19 *N. H.* 337.

<sup>2</sup> *Dugan v. United States*, 3 *Wheat. (U. S.)* 172.

See also *Bainbridge v. Downie*, 6 *Mass.* 253; *Irish v. Webster*, 5 *Greenl. (Me.)* 171; *Bowen v. Morris*, 2 *Taunt.* 374.

§ 919. **Same Subject—Undisclosed Principal.**—In the case of private agents, it is well settled that the principal may thus intervene and enforce contracts made with his agent in the agent's own name, even though the other party was ignorant of the fact of the agency and of the name or existence of a principal, and dealt with the agent as being himself the real party in interest.<sup>1</sup> But where the undisclosed principal thus intervenes and seeks to appropriate the benefits of the transaction, he must also assume its burdens, and it is, therefore, equally well settled that the other party, who has acted in good faith and with reasonable care and diligence, may avail himself, as against the principal, of every defense, whether it be by common law or statute, which existed in his favor against the agent at the time the principal first interposed and demanded performance to himself.<sup>2</sup> So the principal, if he intervenes, is affected by and subject to every defense which the other party may have, based upon such fraud, misrepresentation, concealment or other misconduct as is, either by the prior authorization or subsequent ratification, properly chargeable to the principal as having been done or committed by the agent within the scope of his authority, although the principal himself may have been entirely innocent.<sup>3</sup>

These same principles will, it is believed, be applicable also to the public when it seeks to enforce its rights as an undisclosed principal.<sup>4</sup>

§ 920. **Public may recover Value of Goods sold by its Agents.**—So where the goods or other property of the public, as of the State, have been sold by its officers or agents, the State may sue in its own name for the recovery of the price.<sup>5</sup>

§ 921. **Public may recover Money wrongfully paid out.**—So where a public officer has paid out the public money without authority of law,<sup>6</sup> or under a mistake of fact,<sup>7</sup> or where it has

<sup>1</sup> Mechem on Agency, §§ 769, 772.

<sup>2</sup> Mechem on Agency, § 773.

<sup>3</sup> Mechem on Agency, § 775.

<sup>4</sup> When a State sues, it is limited in its recovery by any defenses that might be set up against individual

plaintiffs: *Ambler v. Auditor-General*, 88 Mich. 746.

<sup>5</sup> *State v. Torinus*, 28 Minn. 175.

<sup>6</sup> *Commonwealth v. Field*, 84 Va. 26, 3 S. E. Rep. 882.

<sup>7</sup> *Belden v. State*, 108 N. Y. 1.

been obtained from him by false pretenses, misrepresentations or fraud,<sup>1</sup> the State or other public authority may maintain an action for its recovery.

§ 922. **Same Subject—How far Public may follow its Funds.**—In the case of private agencies<sup>2</sup> it is well settled that wherever money of the principal comes or is placed in the hands of the agent which it is his duty to pay over to his principal or to apply in any other designated manner, the law impresses upon that money, for the benefit of the principal, a trust for the performance of the object contemplated, which can only be satisfied by its devotion to that object, unless the principal directs it otherwise. While the money remains in the hands of the agent, he cannot shake off the trust by any manner or number of alterations or changes in its specific character, unless all trace of it be completely lost, for it is well settled that equity will follow the fund through any number of transmutations and preserve it for the true owner as long as it can be identified.<sup>3</sup>

And this trust is not confined to the period during which the money remains in the hands of the agent, but follows it into the hands of whomsoever it may come, until it reaches the possession of one who is a *bona fide* holder for value without notice of the trust. It is not necessary to charge a third person as trustee that he should be an active wrongdoer or should attempt to defeat the trust; or that he had notice of the trust at the time the money came into his hands, if he receives notice in time to protect himself. It is enough that he is not a *bona fide* holder for value without notice.<sup>4</sup>

The same principles have been applied to public officers and agents.<sup>5</sup> Thus where one Vincent, who was known to his credi-

<sup>1</sup> See *People v. Denison*, 80 N. Y. 656.

<sup>2</sup> For a fuller discussion of this subject, see *Mechem on Agency*, § 780, *et seq.*

<sup>3</sup> *Farmers' &c., Bank v. King*, 57 Penn. St. 202, 98 Am. Dec. 215; *Van Alen v. American National Bank*, 51 N. Y. 1; *National Bank v. Insurance Co.*, 104 U. S. 54.

<sup>4</sup> *Farmers' &c., Bank v. King*, 57 Penn. St. 202, 98 Am. Dec. 215;

*Van Alen v. American National Bank*, 51 N. Y. 1; *National Bank v. Insurance Co.*, 104 U. S. 54; *Jar- don v. City Bank*, 8 Blatchf. (U. S. C. C.) 480; *Fifth National Bank v. Village of Hyde Park*, 101 Ill. 595, 40 Am. Rep. 218; *Riehl v. Evansville Foundry*, 104 Ind. 70; *Baker v. New York Bank*, 100 N. Y. 31, 53 Am. Rep. 150; *Gage v. Stimson*, 26 Minn. 64.

<sup>5</sup> The State may follow her funds

tor, Wolfe, to be the State treasurer, endorsed and delivered to his creditor in payment of his own private debt, a draft payable to himself as treasurer, it was held that the creditor was chargeable with notice of the official character of the funds and became liable to the State for the money. "The money," said the court, "was trust money in Vincent's hands, bore on its face the impress that it was trust money; Vincent held it as trustee, and, by aiding him in its misapplication, Wolfe constituted himself trustee *in invitum*, co-trustee with Vincent, and liable to account for its misappropriation."<sup>1</sup>

Where, however, the officer becomes the *debtor* of the public, the money becomes in effect his, he may deal with it as he pleases, and the public may resort only to him and his sureties for repayment.<sup>2</sup> So the State may not ordinarily sue to recover its funds until default has been made in paying them into the State treasury,<sup>3</sup> nor can the State recover funds belonging to a county.<sup>4</sup>

§ 923. Public may recover Property wrongfully disposed of.—So where the property of the public has been sold or disposed

into lands unlawfully purchased with them: *State v. Bevers*, 86 N. C. 588, citing *Cook v. Tullis*, 18 Wall. (U. S.) 832; *Cooper v. Landis*, 75 N. C. 526; *Beam v. Froneberger*, *Id.* 540; *Younce v. McBride*, 68 N. C. 532.

<sup>1</sup> *Wolfe v. State*, 79 Ala. 201, 58 Am. Rep. 590, citing *Lee v. Lee*, 67 Ala. 406; *Milhaus v. Dunham*, 78 Ala. 48; *National Bank v. Insurance Co.*, 104 U. S. 54; *Shaw v. Spencer*, 100 Mass. 882, 1 Am. Rep. 115; *Skinner v. Merchants' Bank*, 4 Allen (Mass.) 290; *Oobb v. Wanemaker*, 78 Penn. St. 501. The court distinguish the case at bar from *Van Dyke v. State*, 24 Ala. 81, and dissent from *Perley v. County of Muskegon*, 82 Mich. 182, 20 Am. Rep. 637, and *State v. Keim*, 8 Neb. 63. The former of these two cases is easily distinguishable from the one at bar, as

will be seen from the text; but the Nebraska case, in the writer's opinion, judging from the meager statement of facts given in the official report, is not consistent with reason or authority, if it was intended to hold that the State could not recover the money at all. In this case the State treasurer had, in violation of law, loaned \$2,000 of the State funds to the defendants. The State declared upon the transaction as upon a deposit by it to be repaid upon demand. The court held that as the State had never authorized or ratified the loan, the transaction set forth in the petition constituted no cause of action.

<sup>2</sup> *Perley v. County of Muskegon*, 82 Mich. 182, 20 Am. Rep. 637.

<sup>3</sup> *State v. Rubey*, 77 Mo. 610.

<sup>4</sup> *State v. Rubey*, 77 Mo. 610; *Perley v. County of Muskegon*, 82 Mich. 182, 20 Am. Rep. 637.

of by its officers or agents, without authority of law, the State or other proper authority may maintain an action for its recovery.<sup>1</sup> And this recovery may ordinarily be had, not only against the immediate party acquiring it, but also against his grantee.<sup>2</sup> As has been seen, all persons dealing with a public officer must, at their peril, ascertain the extent of his authority, and one who claims title through the act of such an officer is bound to see that his powers were adequate to the transaction undertaken.<sup>3</sup>

§ 924. **State not estopped by unauthorized Acts of its Officers.**—"The State," it is said in a recent case, "can not be estopped by the acts of any of its officers, done in the exercise of a power not conferred upon them, any more than it can be bound by contracts made by its officers which they were not empowered to make. The powers of all officers are defined and conferred by law, and of these all persons who deal with them must take notice. Acts done in excess of the powers conferred are not official acts."<sup>4</sup>

But while the State may thus not be estopped by the unauthorized acts<sup>5</sup> or by the non-action<sup>6</sup> of its officers, it may, it is held, be estopped in some cases by an express grant.<sup>7</sup>

§ 925. **State entitled to Priority of Payment.**—In analogy to the prerogative right of the crown at common law, it is held in most of the States that the State has, except where an express lien has intervened, a prerogative right to have priority in the payment of its claims out of the estates of debtors.<sup>8</sup>

<sup>1</sup> Day Company v. State, 68 Tex. 526.

<sup>2</sup> Day Company v. State, 68 Tex. 526.

<sup>3</sup> Day Company v. State, 68 Tex. 526.

<sup>4</sup> Day Company v. State, 68 Tex. 526.

<sup>5</sup> State v. Brewer, 64 Ala. 287; Pulaski v. State, 42 Ark. 118; United States v. Kilpatrick, 9 Wheat. (U. S.) 785.

<sup>6</sup> Lake Shore, &c., Ry. Co. v. People, 46 Mich. 193; Detroit v. Weber, 26 Mich. 284; Attorney-General v.

Supervisors, 30 Mich. 368; Attorney-General v. Marr, 55 Mich. 445.

<sup>7</sup> See Magee v. Hallett, 23 Ala. 699; Carver v. Astor, 4 Pet. (U. S.) 1.

<sup>8</sup> Orem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286; State v. Bank of Maryland, 6 G. & J. (Md.) 205, 26 Am. Dec. 561; Jones v. Jones, 1 Bland's Ch. (Md.) 443, 18 Am. Dec. 337; Commonwealth v. Logan, 1 Bibb (Ky.) 529; Commonwealth v. Lewis, 6 Binn. (Penn.) 266.

This right, however, is denied in New Jersey: Middlesex County v. State Bank, 29 N. J. Eq. 263, a. c. 30 Id. 311.

## BOOK V.

### OF SPECIAL REMEDIES AND PROCEEDINGS.

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#### CHAPTER I.

##### OF MANDAMUS TO PUBLIC OFFICERS.

§ 926. Purpose of this Chapter.

#### I. THE GENERAL NATURE OF THE REMEDY.

- 927. Antiquity of the Writ.
- 928. Originally a prerogative Writ.
- 929. The modern Writ defined.
- 930. Authority to issue, how conferred.
- 931. Is an original Writ.
- 932. Not a prerogative Writ in the United States.
- 933. Is a Writ of Right.
- 934. Is a civil Proceeding.
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- 936. How compares with Injunction.

#### II. UNDER WHAT CONDITIONS ISSUED.

- 937. Lies only to enforce existing specific Duty.
- 938. Does not lie to enforce doubtful Right.
- 939. Must be Officer having Power and Duty to act—*De Facto* Officers.
- 940. Same Subject—Effect of Termination of Term—Abatement of Pending Proceedings.

§ 941. Does not lie where there is other adequate Remedy.

942. Does not lie to compel Performance of useless, impossible or unlawful Acts.

943. May be denied in Exercise of legal Discretion.

944. Lies only to compel Performance of official Duty, not Contracts.

945. Does not lie to control Discretion.

946. But Officer vested with Discretion may be compelled to take Action.

947. Ministerial Officer may be compelled to perform his Duty.

948. Upon whose Application Writ will be issued.

949. Necessity of Demand before Issue.

950. Writ not granted till Officer in Default.

#### III. MANDAMUS TO PARTICULAR OFFICERS.

951. In general.



§ 1. *To Officers of the United States.*

952. 1. To President.  
 953. 2. To Heads of Departments.

2. *To State Officers.*

## 1. Governor.

954. Does not lie to control his official Discretion.

955. How in case of ministerial Acts—Authorities against its Use.

956. Same Subject — Authorities permitting its Use.

## 2. Other State Officers.

957. Lies to enforce ministerial but not discretionary Duties.

958. 1. To Secretary of State.

959. 2. To State Treasurer.

960. 3. To State Auditor.

961. 4. To Attorney-General.

962. 5. To Commissioner of Insurance.

3. *To County Officers.*

963. In general.

964. 1. To County Treasurer.

965. 2. To County Clerk.

966. 3. To Recorders of Deeds.

967. 4. To Sheriffs.

4. *To County and Other Boards and Bodies.*

968. Granted to require Performance of ministerial Duties, but not to control Discretion.

5. *To Municipal Officers.*

969. In general.

§ 970. Granted to enforce ministerial Duty, but not to control Discretion.

6. *To Taxing Officers.*

971. Lies to compel Levy of Tax to pay established Claim.

7. *To School Officers.*

972. Lies to compel Performance of Duty.

8. *To Election Officers.*

973. Lies to compel Performance of ministerial Duties.

9. *To Judicial Officers.*

974. Judicial Discretion not interfered with.

975. Judicial Officer may be compelled to act.

976. Judicial Officer may be compelled to perform ministerial Acts.

10. *To Legislative Officers.*

977. Does not lie to control legislative Action.

11. *To try Title to Office.*

978. Does not lie to try Title.

979. Lies to instate one whose Title is clear.

980. Lies to restore Officer wrongfully removed.

981. Lies to restore Insignia of Office.

12. *To Compel Delivery of Books and Papers.*

982. Lies to compel Officer to deliver Books and Papers to his Successor.

§ 926. **Purpose of this Chapter.**—The most important of the special remedies or proceedings which the law provides to secure the due performance of his duties by a public officer is the ancient proceeding by the writ of mandamus.

Mandamus lies, as is well known, not only against public officers, but against private officers in certain cases, and against pub-

lic and private corporations. The latter cases lie obviously outside of the scope of this work, and for these, as well as for a fuller treatment of the application of the writ in the case of public officers, the reader must have recourse to the special treatises upon the subject. Some consideration, however, of the remedy as applied to public officers seems pertinent to the subject of this work and will be given.

## I.

### THE GENERAL NATURE OF THE REMEDY.

§ 927. **Antiquity of the Writ.**—The writ of mandamus is of very ancient origin, instances being found of its application as early as the times of Edward II,<sup>1</sup> but it was not until the latter part of the seventeenth century that it began to take systematic form as a regular portion of the judicial procedure.<sup>2</sup>

§ 928. **Originally a prerogative Writ.**—"It is," says Blackstone, "a high prerogative writ, of a most extensively remedial nature," and he defines it as "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation or inferior court of judicature within the king's dominions, requiring them to do some *particular* thing, therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."<sup>3</sup>

§ 929. **The modern Writ defined.**—"The modern writ of mandamus," says Mr. High,<sup>4</sup> "may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the State or sovereign, directed to some corporation, officer or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law."

<sup>1</sup> See *Dr. Widdrington's Case*, 1 Lev. p. 1, 23.

<sup>2</sup> High on *Ex. Leg. Proc.* § 2.

<sup>3</sup> Blackstone's *Com.* p. 110.

<sup>4</sup> High on *Ex. Leg. Rem.* § 1, citing

8 Black. *Com.* 110; *Dunklin County v. District County Court*, 23 Mo. 449; *Rainey v. Aydelette*, 4 Heisk. (Tenn.) 122. See also *McBride v. Common Council*, 32 Mich. 360, 364.

§ 930. **Authority to issue, how conferred.**—Authority to issue the writ is, in the United States, usually conferred in express terms, either by the constitution or by the statutes, and the practice is, in many States, also made a subject of statutory regulation.

In the Circuit Courts of the United States, the power to issue the writ is not general, but is limited to those cases in which it is necessary to the exercise of their respective jurisdictions;<sup>1</sup> and the same construction has been placed upon statutes conferring the power upon the subordinate State courts.<sup>2</sup>

§ 931. **Is an original Writ.**—It is well settled that the issue of the writ of mandamus is an exercise of original and not of appellate jurisdiction. Where, therefore, the court is invested with appellate jurisdiction only, it can not issue the writ at all except in those cases in which it may be necessary to render its appellate jurisdiction effectual.<sup>3</sup> It can not grant the writ as an original proceeding.<sup>4</sup>

Nor can the legislature confer the power upon a court which, by the constitution, is clothed only with appellate jurisdiction.<sup>5</sup>

§ 932. **Not a prerogative Writ in the United States.**—"Mandamus in modern practice," says Chief Justice TANEY, "is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."<sup>6</sup>

<sup>1</sup> Bath County v. Amy, 13 Wall. (U. S.) 245; McIntire v. Wood, 7 Cranch (U. S.) 504; Graham v. Norton, 15 Wall. (U. S.) 427.

<sup>2</sup> See McBride v. Common Council, 32 Mich. 360.

<sup>3</sup> People v. Turner, 1 Cal. 143, 53 Am. Dec. 295.

<sup>4</sup> Daniel v. County Court, 1 Bibb. (Ky.) 496; Westbrook v. Wicks, 36 Iowa 382; Whitfield v. Greer, 3 Baxt.

(59 Tenn.) 78; State v. Hall, 6 Baxt. (62 Tenn.) 3.

<sup>5</sup> Morgan v. Register, Hardin (Ky.) 609.

<sup>6</sup> Commonwealth v. Dennison, 24 How. (U. S.) 66, 97; Kendall v. United States, 12 Pet. (U. S.) 615; Kendall v. Stokes, 3 How. (U. S.) 100; Arberry v. Beavers, 6 Tex. 457, 55 Am. Dec. 791; Gilman v. Bassett, 33 Conn. 298.

§ 933. **Is a Writ of Right.**—While, as will be seen,<sup>1</sup> the issuance of the writ in a particular case is a matter resting in the sound discretion of the court, and while it will not be issued without a proper showing exhibiting an appropriate case for its exercise, it is generally held that the writ is a writ of right in those cases in which it is applicable.<sup>2</sup>

§ 934. **Is a civil Proceeding.**—Although the proceedings in mandamus are usually criminal in their form, the remedy is one essentially civil in its nature, having all the qualities and attributes of a civil action.<sup>3</sup>

§ 935. **Is not a creative Remedy.**—The writ of mandamus does not in any case, says the court in Virginia, “have the effect of creating any authority, or of conferring power which did not previously exist; its proper function being to set in motion and compel action with reference to previously existing and clearly defined duties. It is, therefore, in no sense a creative remedy, and is only used to compel persons to act where it is their plain duty to act without its agency.”<sup>4</sup> The same rule is tersely expressed by another judge as follows: “It neither confers power nor imposes duty, but is a command to exercise a power already possessed and to perform a duty already imposed.”<sup>5</sup>

§ 936. **How compares with Injunction.**—“An injunction,” says Mr. High,<sup>6</sup> in comparing the two writs, “is essentially a preventive remedy; mandamus a remedial one. The former is usu-

But see per COOLEY, J., *arguendo* that it is a prerogative writ: *McBride v. Common Council*, 33 Mich. 860, 864. See also *School Inspectors v. People*, 20 Ill. 530; *People v. Hatch*, 33 Ill. 184; *People v. Police Board*, 26 N. Y. 816; *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210; *People v. Judge*, 41 Mich. 81; *People v. Ferris*, 76 N. Y. 326; *Tawas, &c. Co. v. Judge*, 44 Mich. 479.

<sup>1</sup> See *post*, § 948.

<sup>2</sup> *Commonwealth v. Dennison*, 24 How. (U. S.) 66; *Gilman v. Bassett*, 33 Conn. 298; *Arberry v. Beavers*, 6

Tex. 457, 55 Am. Dec. 791; *Fisher v. Charleston*, 17 W. Va. 595; *People v. Regents*, 4 Mich. 98.

*Contra*, see cases cited in note 8 to preceding section. See also *People v. Judge*, 41 Mich. 81.

<sup>3</sup> High Ex. Leg. Rem. § 8; *State v. Bailey*, 7 Iowa 890; *Judd v. Driver*, 1 Kans. 455.

<sup>4</sup> *Tyler v. Taylor*, 29 Gratt. (Va.) 765.

<sup>5</sup> *Lowe v. Phelps*, 14 Bush (Ky.) 642. See also *People v. Gilmer*, 10 Ill. 242; *People v. Village of Crotty*, 93 Ill. 180.

<sup>6</sup> High's Ex. Leg. Rem. § 6.

ally employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and enforce inaction, those of a mandamus to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy, mandamus as an active one. The former preserves matters *in statu quo*, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is, therefore, a positive or remedial process, the other a negative or preventive one."

## II.

### UNDER WHAT CONDITIONS ISSUED.

§ 937. **Lies only to enforce existing, specific Duty.**—Such being the nature and functions of the writ, it is well settled that it can be resorted to only for the purpose of enforcing the performance of a specific duty already existing and clearly imposed upon the officer either by express law or as one of the necessary functions or attributes of the office which he holds.<sup>1</sup>

§ 938. **Does not lie to enforce doubtful Right.**—It is but a restatement of the previous rule, and it is equally well settled, that the writ will not be issued to enforce a doubtful right, nor where the legal duty is not clear and certain.<sup>2</sup>

<sup>1</sup> Meadows v. Nesbit, 12 Lea (Tenn.) 489; People v. Hatch, 88 Ill. 9; People v. Lieb, 85 Ill. 484; People v. Klokke, 93 Ill. 184; State v. Francis, 95 Mo. 44; State v. District Court, 49 N. J. L. 537; State v. Board, 28 S. C. 258; State v. Weld, — Minn. —, 40 N. W. Rep. 561; Hall v. Steele, 83 Ala. 562; People v. Chapin, 104 N. Y. 96; People v. Judges, 1 Dougl. (Mich.) 802.

<sup>2</sup> Cassatt v. Barber County, 39 Kan. 505; Elizabeth v. Essex County Court, 49 N. J. L. 626; People v. Johnson, 100 Ill. 537, 89 Am. Rep. 68; Police Board v. Grant, 9 Smedes & M. (Miss.) 77, 47 Am. Dec. 102; People v. Brooklyn, 1 Wend. (N. Y.) 818, 19

Am. Dec. 502; People v. Salomon, 46 Ill. 415; People v. Mayor, 51 Ill. 17; People v. Glann, 70 Ill. 232; Peck v. Booth, 43 Conn. 371; Tarver v. Commissioners, 17 Ala. 527; People v. Supervisors, 64 N. Y. 600; People v. Hayt, 66 N. Y. 606; Dutton v. Hanover, 42 Ohio St. 215; Commonwealth v. Mitchell, 82 Penn. St. 343; Cook v. Peacham, 50 Vt. 231; State v. New Haven, &c. Co. 45 Conn. 331; State Board v. West Point, 50 Miss. 638; Sabine v. Rounds, 50 Vt. 74; Tyler v. Taylor, 29 Gratt. (Va.) 765; Townes v. Nichols, 78 Ma. 515; People v. Judges, 1 Dougl. (Mich.) 802; People v. Judges, 1 Dougl. (Mich.) 819; People v. Judges, 19 Mich. 296; Pack v.

And the party applying for the writ must show by his application that all the conditions exist which are necessary to create the duty. They must not be left to inference.<sup>1</sup>

§ 939. **Must be Officer having Power and Duty to act—De Facto Officers.**—"It is of the very essence of this proceeding," says Chief Justice Dixon, "that there be some officer or officers in being having the power and whose duty it is to perform the act. If there be no such officers, it is obvious that the writ cannot go, nor the mandate of the court be enforced."<sup>2</sup>

But if the office be filled by an officer *de facto*, he may be compelled to act;<sup>3</sup> the rule above referred to applying only when there is neither a *de jure* nor a *de facto* officer.<sup>4</sup>

§ 940. **Same Subject—Effect of Termination of Term—Abatement of pending Proceedings.**—Mandamus will not be granted to require action on the part of an officer whose authority to do the act has terminated,<sup>5</sup> or whose term of office has expired.<sup>6</sup>

So it has been held that an abatement of pending proceedings takes place by the expiration of the term of office of respondents whose alleged delinquency was personal and did not involve any charge against the government whose officers they were.<sup>7</sup>

But where the duty, whose violation or neglect is complained of, is a continuing one, attaching to the office irrespective of the person who may chance to fill it, and the proceeding is taken to enforce, through the officer, the obligation of the corporation, municipality or government whose officer he is, it is well settled that the proceedings do not abate by the termination of the term of him who was the incumbent at their inception but may go on and be enforced against his successor.<sup>8</sup> "The proceedings may

Supervisors, 36 Mich. 377; Peck v. Supervisors, 47 Mich. 477; Post v. Sparta, 63 Mich. 323.

<sup>1</sup> People v. Woodhull, 14 Mich. 28; People v. Judges, 19 Mich. 296.

<sup>2</sup> State v. Beloit, 21 Wis. 280, 91 Am. Dec. 474.

<sup>3</sup> Kelly v. Wimberly, 61 Miss. 548; State v. Fortenberry, 56 Miss. 286; State v. McEntyre, 3 Ired. (N. C.) 171.

<sup>4</sup> State v. Beloit, *supra*.

<sup>5</sup> Hall v. Steele, 32 Ala. 563.

<sup>6</sup> Lamar v. Wilkins, 28 Ark. 34; Mason v. School District, 20 Vt. 437; State v. Lynch, 8 Ohio St. 347.

<sup>7</sup> Secretary v. McGarrahan, 9 Wall. (U. S.) 298; United States v. Boutwell, 17 Id. 604, as explained in Thompson v. United States, 103 U. S. 430, 435.

<sup>8</sup> State v. Warner, 55 Wis. 271; State v. Gates, 22 Wis. 210; People v. Collins, 19 Wend. (N. Y.) 56; Mad-

be commenced with one set of officers and terminate with another, the latter being bound by the judgment."<sup>1</sup>

§ 941. Does not lie where there is other adequate Remedy. —The writ of mandamus being an extraordinary one, granted only for the furtherance of justice and that right may not fail for want of a remedy, it is well settled that it will not be granted where the party applying for it has, either by an ordinary action at law or by virtue of some statutory provision, an other adequate and specific remedy at law for the wrong complained of.<sup>2</sup> Thus, as one of many instances, the writ will not be granted where the party has an adequate remedy by appeal.<sup>3</sup>

But in order to bar the right to mandamus, the party must not only have a specific, adequate and legal remedy, but it must be one competent to afford relief upon the very subject-matter of his application;<sup>4</sup> and if it is doubtful whether such action or

*dox v. Graham*, 2 Met. (Ky.) 56; *Pegram v. Commissioners*, 65 N. C. 114; *Reeder v. Wexford Co.* 37 Mich. 351; *People v. Champion*, 16 Johns. (N. Y.) 60; *Thompson v. United States*, 103 U. S. 480, 483, and cases cited, per BRADLEY, J.

<sup>1</sup>*Thompson v. United States*, 103 U. S. 480, 483.

<sup>2</sup>*State v. Kinkaid*, 23 Neb. 641, 37 N. W. Rep. 612; *Moon v. Wellford*, 84 Va. 34, 4 S. E. Rep. 572; *State v. Buhler*, 90 Mo. 560; *Excelsior Mut. Aid Ass'n. v. Riddle*, 91 Ind. 84; *King William Justices v. Munday*, 2 Leigh (Va.) 165, 21 Am. Dec. 604; *Commonwealth v. Rosseter*, 2 Binn. (Penn.) 360, 4 Am. Dec. 451; *American Asylum v. Phoenix Bank*, 4 Conn. 173, 10 Am. Dec. 112; *Ex parte Cheatham*, 6 Ark. 437; *Ex parte Williamson*, 8 Ark. 424; *Peralta v. Adams*, 2 Cal. 594; *Early v. Manix*, 15 Cal. 149; *People v. Hubbard*, 22 Cal. 34; *People v. McLane*, 62 Cal. 616; *People v. Hatch*, 33 Ill. 9; *People v. Salomon*, 46 Ill. 415; *Louisville, &c., R. R. Co. v. State*, 25 Ind. 177; *Fogle v. Gregg*, 26 Ind. 345;

*State v. County Judge*, 5 Iowa 380; *Marshall v. Sloan*, 35 Iowa 445; *State v. Judge*, 12 La. Ann. 343; *State v. Police Jury*, 29 La. Ann. 146; *People v. Supervisors*, 11 N. Y. 563; *People v. Hawkins*, 46 N. Y. 9; *State v. Supervisors*, 29 Wis. 79; *Lexington v. Mulliken*, 7 Gray (Mass.) 280; *Shelby v. Hoffman*, 7 Ohio St. 450; *State v. Engleman*, 45 Mo. 27; *Mansfield v. Fuller*, 50 Mo. 338; *Ward v. County Court*, 50 Mo. 401; *Alger v. Seaverns*, 188 Mass. 331; *People v. Judges*, 1 Dougl. (Mich.) 302; *People v. Judges*, 1 Dougl. (Mich.) 319; *People v. Judge*, 1 Mich. 359; *People v. Judge*, 19 Mich. 296; *Wiley v. Judge*, 29 Mich. 487.

<sup>3</sup>*State v. Babcock*, 23 Neb. 38; *Barnett v. Earlham*, 78 Iowa 134; *State v. Megown*, 89 Mo. 156; *Hemphill v. Collins*, 117 Ill. 336; *State v. Lubke*, 85 Mo. 338; *Pickell v. Owen*, 66 Iowa 485; *Hightower v. Overhauser*, 65 Iowa 347; *Ewing v. Cohen*, 63 Tex. 432.

<sup>4</sup>*Fremont v. Crippen*, 10 Cal. 212, 70 Am. Dec. 711; *Babcock v. Goodrich*, 47 Cal. 503; *California, &c., R.*

proceeding will afford him a complete remedy the writ should issue.<sup>1</sup> If the other remedy does not secure to the party the actual performance of the duty owing to him, if it does not afford him the particular right which the law intended to secure to him, if it does not place him in the position in which he would have been had the duty been performed, if it does not end in the actual performance of the duty, it is not such an adequate and specific remedy as will prevent the issuance of the writ.<sup>2</sup> Thus the fact that the party may have a remedy by a criminal prosecution<sup>3</sup> or by an action upon the case against the officer<sup>4</sup> or by bringing suit upon the officer's bond,<sup>5</sup> will not prevent the granting of the writ. So a remedy by a bill in equity does not bar the relief.<sup>6</sup>

§ 942. Does not lie to compel Performance of useless, impossible or unlawful Acts.—So the writ will not be granted to direct the doing of an act where it is apparent that the writ, if granted, could not be enforced,<sup>7</sup> or, for any other reason, would be unavailing.<sup>8</sup>

R. Co. v. Central, &c., R. R. 47 Cal. 581; Price v. Riverside, &c., Co., 56 Cal. 484; State v. Wright, 10 Nev. 175; Etheridge v. Hall, 7 Port. (Ala.) 47; Mobile, &c., R. R. Co. v. Wisdom, 5 Heisk. (Tenn.) 125; Porter Township v. Jersey Shore, 82 Penn. St. 275.

<sup>1</sup> State v. Wright, 10 Nev. 175; Etheridge v. Hall, 7 Port. (Ala.) 47; Fremont v. Crippen, 19 Cal. 212, 70 Am. Dec. 711. As where the other remedy is not sufficiently speedy. Tawas, &c., Co. v. Judge, 44 Mich. 479.

<sup>2</sup> See Etheridge v. Hall, 7 Port. (Ala.) 47; Fremont v. Crippen, 10 Cal. 212, 70 Am. Dec. 711; Babcock v. Goodrich, 47 Cal. 508; State v. Wright, 10 Nev. 175.

<sup>3</sup> Fremont v. Crippen, 10 Cal. 212, 70 Am. Dec. 711; Rex v. Severn, &c., Ry. Co., 2 B. & Ald. 646; Etheridge v. Hall, 7 Port. (Ala.) 47; *In re* Trustees of Williamsburgh, 1 Barb. (N. Y.) 84; People v. Mayor, 10 Wend.

(N. Y.) 395; Ayres v. Auditors, 43 Mich. 422.

<sup>4</sup> Fremont v. Crippen, 10 Cal. 212, 70 Am. Dec. 711; Mobile, &c., R. R. Co. v. Wisdom, 5 Heisk. (Tenn.) 125.

<sup>5</sup> Babcock v. Goodrich, 47 Cal. 508; State v. Dougherty, 45 Mo. 294; *Contra*, where writ was asked to compel sheriff to make a levy. Haversham v. Sears, 11 Oreg. 431, 50 Am. Rep. 481.

<sup>6</sup> People v. State Treasurer, 24 Mich. 468; People v. Mayor, 10 Wend. (N. Y.) 395.

<sup>7</sup> Bassett v. School Directors, 9 La. Ann. 518.

<sup>8</sup> As to instate an officer who if instated would be at once ousted, State v. Board of Health, 49 N.J. L. 849; or whose term has already expired, Fitzpatrick v. Kirby, 81 Va. 487; Lacoste v. Duffy, 49 Tex. 767, 80 Am. Rep. 122; or to compel an officer to act whose term has expired, Lamar v. Wilkins, 28 Ark. 84; or whose jurisdiction has ceased, Williams v.



or where the act is impossible<sup>1</sup> or unlawful<sup>2</sup> to be done. So the writ will not be granted where, though the act in question was once the duty of the officer, it has now ceased to be so,<sup>3</sup> or where he has been enjoined from acting,<sup>4</sup> or where the action is barred by the statute of limitations.<sup>5</sup> *A fortiori* will it not be granted where the act has been already done.<sup>6</sup>

Neither will the writ be granted to compel the doing of that which the officer offers to do without a mandamus.<sup>7</sup>

§ 943. May be denied in Exercise of legal Discretion.—Notwithstanding that there is, as has been seen,<sup>8</sup> a strong tendency to regard the writ as one of right in cases to which it is properly applicable, it is not so far a writ of right as to leave the court

County Commissioners, 35 Me. 345; or to compel a clerk to send up a cause for hearing, where if sent up it could not be heard, *Roberts v. Smith*, 63 Ga. 213; or to compel school officers to admit a scholar to a term of school where the application was made one day before the term would expire, and could not be heard until afterwards, *Cristman v. Peck*, 90 Ill. 150; or to compel the designation of an official paper where no paper of the kind required exists, *State v. Mayor*, 40 N. J. L. 152; or to grant a hearing for a motion for a new trial where the motion was made too late to be heard, *Clark v. Crane*, 57 Cal. 639; or to compel the payment of orders drawn upon an exhausted fund, *Cabanias v. Hill*, 74 Ga. 845, or to compel officers to meet for the purpose of agreeing upon a matter, where it appears that they have often met but cannot agree, *Case v. Blood*, 68 Iowa 486; or to levy a tax where the power to levy has been already exhausted, *Clay County v. McAleer*, 115 U. S. 616.

For other illustrations, see: *People v. Chicago, &c.*, R. R. Co. 55 Ill. 95; *People v. Dulaney*, 96 Ill. 503; *Price v. Walker*, 44 Iowa 458; *Bassett v.*

*School Directors*, 9 La. Ann. 513; *Woodbury v. County Commissioners*, 40 Me. 304; *State v. Vanarsdale*, 43 N. J. L. 536; *People v. Dutchesa, &c.*, R. R. Co., 53 N.Y. 153; *State v. Perine*, 5 Vroom (N. J.) 254; *O'Hara v. Powell*, 80 N. C. 104.

<sup>1</sup> *Bates v. Porter*, 74 Cal. 224; *Silverthorn v. Warren R. Co.*, 33 N. J. L. 173; (unless the impossibility is caused by respondent's own act, *Queen v. Birmingham, &c.*, R. Co., 3 Ad. & El. (N. S.) 47); *State v. Perine*, 34 N. J. L. 254; *Ackerman v. Desha Co.*, 27 Ark. 457; *Ball v. Lappius*, 3 Oreg. 55.

<sup>2</sup> *People v. Hyde Park*, 117 Ill. 463; *Gillespie v. Wood*, 4 Humph. (Tenn.) 437; *Ross v. Lane*, 11 Miss. 695; *People v. Fowler*, 55 N. Y. 252; *Johnson v. Lucas*, 11 Humph. (Tenn.) 306.

<sup>3</sup> *Hall v. Steele*, 33 Ala. 563.

<sup>4</sup> *People v. Supervisors*, 30 Hun (N. Y.) 146; *Railroad Co. v. Wyandot Co.*, 7 Ohio St. 278.

<sup>5</sup> *People v. Chapin*, 104 N. Y. 96.

<sup>6</sup> *Spiritual Athenæum Society v. Randolph*, 53 Vt. 192.

<sup>7</sup> *People v. Dulaney*, 96 Ill. 503.

<sup>8</sup> See *ante*, § 933.

no discretion as to its issue; for it is well settled that, to a large degree at least, the question whether it shall be granted or not is one resting in the sound discretion of the court.<sup>1</sup> The court will, therefore, refuse to interfere where it might work injustice or hardship, or will affect persons who have had no opportunity to be heard,<sup>2</sup> or is sought to compel the observance of the strict letter of the law in violation of its true spirit,<sup>3</sup> or to gratify personal spite.<sup>4</sup>

But the discretion which is to be exercised is not an arbitrary or capricious one, but is a sound, legal discretion to be exercised in accordance with established principles and the well settled rules of law.<sup>5</sup>

§ 944. *Lies only to compel Performance of official Duty, not Contracts.*—The writ lies only to enforce the performance of official duty,<sup>6</sup> and it is not considered an appropriate remedy to compel the performance of mere contract obligations.<sup>7</sup>

§ 945. *Does not lie to control Discretion.*—Where the law imposes upon a public officer the right and duty to exercise judgment or discretion in respect to any matter submitted to him or in reference to which he is called upon to act, it is, of course, *his* judgment or discretion that is to be exercised, and not that of

<sup>1</sup>State v. Graves, 19 Md. 351, 81 Am. Dec. 639; Dane v. Derby, 54 Me. 95, 89 Am. Dec. 722; State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314; Booze v. Humbird, 27 Md. 4; State v. Kirkley, 29 Md. 109; Jennings v. Fisher, 7 Cush. (Mass.) 239; *Ex parte Fleming*, 4 Hill (N. Y.) 583; People v. Hatch, 33 Ill. 134; People v. Ketchum, 72 Ill. 212; State v. Commissioners, 26 Kans. 419; State v. Commissioners, 28 Kans. 67; Belcher v. Treat, 61 Me. 577; Davis v. Commissioners, 63 Me. 396; Free Press Association v. Nichols, 45 Vt. 7.

<sup>2</sup>People v. Forquer, Breese (Ill.) 63.

<sup>3</sup>State v. Commissioners, 26 Kans. 419.

<sup>4</sup>Hale v. Risley, 69 Mich. 596, 14 West. Rep. 188.

<sup>5</sup>Brooke v. Widdicombe, 39 Md.

386: "The application is to the discretion of the court; but this is not an arbitrary discretion; it is a judicial discretion; and when there is a right, and the law has established no specific remedy, this writ should not be denied. This writ was granted only to prevent a failure of justice, and is no doubt more freely and frequently granted at the present time than it was formerly." Jennings v. Fisher, 7 Cush. (Mass.) 239.

<sup>6</sup>Mayo v. Commissioners, 141 Mass. 74.

<sup>7</sup>Tobey v. Hakes, 54 Conn. 274, 1 Am. St. Rep. 114; Parrott v. City of Bridgeport, 44 Conn. 180, 26 Am. Rep. 439; Cushman v. Thayer Mfg. Co., 76 N. Y. 365, 82 Am. Rep. 315; Port Huron Board of Education v. City Treasurer, 57 Mich. 46.

any other officer or court. Courts, therefore, will not attempt by mandamus to compel the officer vested with such discretion to exercise it in any particular way, or to come to any particular decision,<sup>1</sup> or to revise or alter his judgment when he has once exercised it.<sup>2</sup>

Thus the writ will not be granted to review, revise or control the discretion of an officer authorized and required to exercise it in granting licenses,<sup>3</sup> or approving the appointment of teachers,<sup>4</sup> or letting contracts to the lowest responsible bidder,<sup>5</sup> or in fixing the compensation of other officers or agents,<sup>6</sup> or judging of the sufficiency of bonds,<sup>7</sup> or deciding upon the suspension of a pilot,<sup>8</sup> or deciding whether to license the sale of liquors,<sup>9</sup> or granting leave to practice as a physician,<sup>10</sup> or deciding upon the allowance of claims,<sup>11</sup> or deciding upon the expulsion of a member from a body which is the final judge of the qualifications of its members,<sup>12</sup> or deciding whether an applicant is qualified to receive a certificate as a teacher,<sup>13</sup> or removing subordinate officers,<sup>14</sup> or

<sup>1</sup> *People v. Knickerbocker*, 114 Ill. 539, 55 Am. Rep. 879; *People v. Pearson*, 2 Scam. (Ill.) 304, 33 Am. Dec. 445; *Village of Glencoe v. People*, 78 Ill. 383; *County of St. Clair v. People*, 85 Ill. 396; *People v. Williams*, 55 Ill. 178; *Commonwealth v. McLaughlin*, 120 Penn. 518, 14 Atl. Rep. 377; *State v. Webber*, 38 Minn. 397; *State v. Board*, 28 S. C. 258; *State v. St. Bernard*, 39 La. Ann. 759, 2 S. Rep. 305; *Commonwealth v. Boone City Court*, 82 Ky. 632; *State v. St. Louis Court of Appeals*, 87 Mo. 374; *Weeden v. Town Council*, 9 R. I. 123, 98 Am. Dec. 373; *Houghton Co. v. Auditor-General*, 36 Mich. 271; *People v. Auditor-General*, 3 Mich. 427.

<sup>2</sup> *State v. Young*, 84 Mo. 90; *People v. Chapin*, 104 N. Y. 96, 10 N. E. Rep. 141; *People v. Equitable L. Assur. Society*, 103 N. Y. 635.

<sup>3</sup> *People v. Thatcher*, 42 Hun (N. Y.) 849; *Deehan v. Johnson*, 141 Mass. 23.

<sup>4</sup> *Wintz v. Charleston Board*, 28 W. Va. 227.

<sup>5</sup> *State v. McGrath*, 91 Mo. 336.

<sup>6</sup> *Cicotte v. Wayne County*, 59 Mich. 509.

<sup>7</sup> *Arapahoe County v. Crotty*, 9 Colo. 318; *McHenry v. Township Board*, 65 Mich. 9; *Post v. Township Board*, 64 Mich. 597; *Buckman v. Commissioners*, 80 N. C. 121; *Swan v. Gray*, 44 Miss. 393.

<sup>8</sup> *State v. Commissioners*, 23 S. C. 175.

<sup>9</sup> *Stanley v. Monnet*, 34 Kan. 706.

<sup>10</sup> *State v. Gregory*, 83 Mo. 123, 53 Am. Rep. 565; *State v. State Medical Board*, 32 Minn. 324, 50 Am. Rep. 575.

<sup>11</sup> *People v. Auditors*, 10 Mich. 307; *People v. Supervisors*, 26 Mich. 422.

<sup>12</sup> *People v. Mayor*, 41 Mich. 2.

<sup>13</sup> *Bailey v. Ewart*, 53 Iowa 111.

<sup>14</sup> *State v. Fire Commissioners*, 26 Ohio St. 24.

suspending a pupil for misconduct,<sup>1</sup> or locating a county seat,<sup>2</sup> or deciding whether such facts exist as make it his duty to call an election,<sup>3</sup> or deciding upon the qualifications of a voter.<sup>4</sup>

§ 946. But Officer vested with Discretion may be compelled to take Action.—But though the officer vested with discretion will thus not be compelled to reach any particular conclusion, he can not refuse, in violation of his duty, to act at all, and if he does, mandamus may be resorted to to compel him to act, —to take whatever action is necessary as a preliminary to the exercise of his discretion, as to hear the claim, or entertain the petition, or pass upon the bond, or meet to confer, or pass upon the matter, as the particular case may require.<sup>5</sup>

§ 947. Ministerial Officer may be compelled to perform his Duty.—When, however, the domain of the purely ministerial duties is reached, the application of the writ is frequent and certain. For it is well settled that where a clear and specific duty of a ministerial nature, involving no element of judgment or discretion, is positively imposed upon a public officer by law, its performance may be enforced by mandamus where no other adequate and specific remedy exists. In such a case, the writ may command the performance of the very act itself.<sup>6</sup>

§ 948. Upon whose Application will Writ be issued.—Where the writ of mandamus is sought for the purpose of enforcing a purely private right, in which the public, as such, has no special

<sup>1</sup> *State v. Burton*, 45 Wis. 150.

<sup>2</sup> *State v. Bonner*, Busb. (N. C.) L. 257.

<sup>3</sup> *Sansom v. Mercer*, 68 Tex. 488, 2 Am. St. Rep. 505.

<sup>4</sup> *Weeden v. Town Council*, 9 R. I. 128, 98 Am. Dec. 873.

<sup>5</sup> *State v. Webber*, 38 Minn. 397; *Case v. Blood*, 71 Iowa 632; *Eden v. Templeton*, 72 Iowa 637; *People v. Barnes*, 66 Cal. 594; *Mobile Ins. Co. v. Cleveland*, 76 Ala. 321; *People v. Judge*, 27 Mich. 170; *Attorney-General v. Common Council*, 29 Mich. 106; *State v. Commissioners*, 31 Ohio St. 451.

<sup>6</sup> *Humboldt County v. Commission-*

*ers*, 6 Nev. 80; *People v. Bender*, 36 Mich. 195; *People v. Auditor-General*, 3 Mich. 427; *United States v. Seaman*, 17 How. (U. S.) 225; *United States v. Commissioners*, 5 Wall. (U. S.) 563; *United States v. Schurz*, 102 U. S. 378; *Ex parte R. R. Co.* 46 Ala. 428; *State v. Secretary of State*, 33 Mo. 293; *Freeman v. Selectmen*, 34 Conn. 406; *State v. Robinson*, 1 Kana. 188; *People v. Sexton*, 37 Cal. 532; *Barksdale v. Cobb*, 16 Ga. 18; *Ex parte Banks*, 28 Ala. 28; *People v. Collins*, 19 Wend. (N. Y.) 56; *Howland v. Eldredge*, 48 N. Y. 457; *Citizens' Bank v. Wright*, 6 Ohio St. 818; *People v. Supervisors*, 3 Mich. 475.

interest, the application for the writ should be made by and in the name of the party who is directly and particularly interested.<sup>1</sup>

In the case of purely public duties, however, except those due to the government as such, the rule is not so well or clearly settled, but the preponderance of authority is in favor of the rule that private persons, even though they have no other interest than that of any citizen, may institute the proceeding to compel the officer to perform his public duty.<sup>2</sup>

But this rule is not universal, and mandamus has been denied, upon the application of a private individual showing no peculiar interest, in Michigan to compel the regents of a university to appoint a college professor,<sup>3</sup> or the inspectors of a State's prison to discontinue teaching trades;<sup>4</sup> in Maine to compel the location of a road;<sup>5</sup> in Pennsylvania to require the opening of an alley;<sup>6</sup> in Kansas to compel the calling of an election to fix a county seat,<sup>7</sup> or to determine upon an issue of bonds,<sup>8</sup> or to compel the canvassing of votes;<sup>9</sup> and in Iowa, though stress was laid upon the peculiar language of their statute, to compel a railroad company to relocate its road.<sup>10</sup>

§ 949. *Necessity of Demand before Issue.*—Where the duty

<sup>1</sup> *Sanger v. County Commissioners*, 25 Me. 291; *Heffner v. Commonwealth*, 28 Penn. St. 108; *Bobbett v. State*, 10 Kans. 9; *State v. Henderson*, 38 Ohio St. 644.

<sup>2</sup> *State v. Weld*, 39 Minn. 426; *Throckmorton v. State*, 20 Neb. 647; *Union Pacific R. R. Co. v. Hall*, 91 U. S. 843, 355; *Village of Glencoe v. People*, 78 Ill. 383; *State v. Gracey*, 11 Nev. 228; *State v. Shropshire*, 4 Neb. 411; *People v. Collins*, 19 Wend. (N. Y.) 56; *Pike County v. State*, 11 Ill. 203; *Ottawa v. People*, 48 Ill. 233; *Hall v. People*, 57 Ill. 307; *People v. Halsey*, 37 N. Y. 344; *State v. Rahway*, 33 N. J. L. 110; *Pumphrey v. Mayor*, 47 Md. 145, 28 Am. Rep. 446; *State v. Commissioners*, 17 Fla. 707; *Moses v. Kearney*, 31 Ark. 261; *Hamilton v. State*, 3 Ind. 458; *Templeton*

*v. Police Jury*, 11 La. Ann. 141; *State v. Francis*, 95 Mo. 44; *Cannon v. Janvier*, 8 Houst. (Del.) 27.

<sup>3</sup> *People v. Regents*, 4 Mich. 93, 18 Mich. 469, 30 Mich. 473.

<sup>4</sup> *People v. Inspectors*, 4 Mich. 187. And to like effect: *Police Justice v. Kent Supervisors*, 38 Mich. 421.

<sup>5</sup> *Sanger v. County Commissioners*, 25 Me. 291. See also *Mitchell v. Boardman*, 79 Me. 469.

<sup>6</sup> *Heffner v. Commonwealth*, 28 Penn. St. 108.

<sup>7</sup> *Bobbett v. State*, 10 Kans. 9; *Adkins v. Doolen*, 23 Kans. 659.

<sup>8</sup> *Turner v. Commissioners*, 10 Kans. 16.

<sup>9</sup> *Reedy v. Eagle*, 23 Kans. 254.

<sup>10</sup> *Crane v. Chicago, &c. Ry. Co.* 74 Iowa 330, 7 Am. St. Rep. 479.

whose performance is sought to be enforced is one owing to an individual, it must appear that the officer from whom the performance is due has been requested to perform the duty and that he has, without lawful excuse, refused or neglected to comply.<sup>1</sup>

Where, however, the duty is one owing to the public, and not to individuals, and no one is expressly designated by law to make a demand, it is generally held that no specific demand and refusal need be shown. In such a case, the law stands in place of a demand, and it is enough that the officer has distinctly manifested an intention not to perform a clear and specific duty which the law imposes.<sup>2</sup>

By some authorities, however, a demand and refusal are said to be necessary in all cases.<sup>3</sup>

§ 950. **Writ not granted till Officer in Default.**—It is a general rule, and so supported both by reason and authority, that the duty whose performance it is sought to enforce must, at the time of making the application, be one fully matured and ripe for performance, and that the writ will not be granted to compel the performance of an act which the officer is not yet under any obligation to perform.<sup>4</sup> The law presumes that the officer will do his duty when the time arrives, and hence, in general, no mere threats of non-performance will be sufficient to set the court in motion.<sup>5</sup>

Thus the writ will not issue to compel the payment of an

<sup>1</sup> *People v. Hyde Park*, 117 Ill. 462; *State v. Adams*, 19 Nev. 870; *Attorney-General v. Boston*, 123 Mass. 460, 477; *State v. Schaack*, 28 Minn. 358; *Jefferson County v. Arrighi*, 54 Miss. 667; *State v. Davis*, 17 Minn. 429; *State v. Lehre*, 7 Rich. (S. C.) 284; *Oroville, &c. R. Co. v. Supervisors*, 87 Cal. 354; *State v. Board of Liquidation*, 81 La. Ann. 278.

<sup>2</sup> *Attorney-General v. Boston*, 123 Mass. 460, 477; *Commonwealth v. Commissioners*, 87 Penn. St. 287; *State v. Rahway*, 33 N. J. L. 110; *State v. County Judge*, 7 Iowa 186.

<sup>3</sup> See *Colt v. Elliott*, 28 Ark. 294;

*Condit v. Commissioners*, 25 Ind. 422; *State v. Davis*, 17 Minn. 429; *State v. Schaack*, 28 Minn. 358; *Kemerer v. State*, 7 Neb. 180; *State v. Governor*, 25 N. J. L. 381. But in all these cases except the second, the duty was one owing chiefly to the individual applying for the writ.

<sup>4</sup> *State v. Van Winkle*, 43 N. J. L. 125; *State v. Board*, 81 La. Ann. 278; *Mayor v. Stoll*, 53 Md. 435; *State v. Houston*, 40 La. Ann. 398, 8 Am. St. Rep. 532.

<sup>5</sup> *State v. Carney*, 3 Kans. 88; *Commissioners of Schools v. County*, 20 Md. 449.

order out of a fund which the officer has not yet received,<sup>1</sup> nor to require him to take action during a time which the law expressly gives him for deliberation.<sup>2</sup>

But this general rule is not a conclusive one. It is simply an aid to the court in exercising that sound legal discretion which is the basis of its action, and which is of greater importance than the rule. When, therefore, the officer against whom the writ is demanded has clearly manifested a determination to disobey the laws, the court is not obliged to wait until the evil is done before issuing the writ.<sup>3</sup>

### III.

#### MANDAMUS TO PARTICULAR OFFICERS.

§ 951. In general.—Having thus examined some of the general principles governing the application of this remedy, some attention will now be given, by way of illustration, to its use in the case of certain of the more important public officers.

##### 1. *To Officers of the United States.*

§ 952. 1. To President.—No case has been discovered in which the question of the power to control the official actions of the President of the United States has been directly involved, but it is clear from the principles so forcibly stated by Chief Justice MARSHALL in the great case of *Marbury v. Madison*,<sup>4</sup> and so frequently applied in the case of the governors of the States,<sup>5</sup> that the performance of those important duties of a political or discretionary nature which the constitution has confided to the

<sup>1</sup> *State v. Burbank*, 22 La. Ann. 298.

<sup>2</sup> *Mayor v. Stoll*, 53 Md. 435.

<sup>3</sup> *Attorney-General v. Boston*, 128 Mass. 460, 474, citing *King v. Milverton*, 3 A. & E. 284; *Queen v. Eastern Railways*, 10 A. & E. 531; *Attorney-General v. Birmingham Railway*, 4 DeG. & Sm. 490, 498; *Queen v. York Railway*, 1 E. & B. 178; *Queen v.*

*Lancashire Ry. Id.* 238; *Queen v. Great Western Ry. Id.* 253; *Edinburgh, &c. Ry. v. Philip*, 3 Macq. 614, 526; *Webb v. Commissioners, L. R. 5 Q. B. 642*; *Farnsworth v. Boston*, 121 Mass. 173.

<sup>4</sup> *Marbury v. Madison*, 1 Cranch (U. S.) 137.

<sup>5</sup> *Post*, §§ 954-956.

executive as one of the co-ordinate branches of the government, is beyond the regulation or control of the courts. What would be the rule applied in case 'a merely ministerial duty, not necessarily belonging to the executive functions, should be imposed upon the President by express law, is a question upon which the cases dealing with similar questions in the case of the governors of the States, as hereinafter noticed,' may throw some light.

§ 953. 2. To Heads of Departments.—It is clear, also, in the case of the heads of departments, like the various members of the President's cabinet, that similar considerations must, in many cases, apply. Many of the duties imposed upon these officers are political or discretionary, and are a part of the great executive power with which the President is clothed. Thus it is said by Chief Justice MARSHALL, in the case referred to: "By the constitution of the United States the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts."

But in addition to this class of powers and duties, duties are frequently imposed upon these officers which are not discretionary or political, but ministerial in their nature, being positively imposed by express law, and of a kind which might have been

<sup>1</sup> *Post*, §§ 954-956.

<sup>2</sup> *Marbury v. Madison*, 1 Cranch (U. S.) 137, 166.



required of any other officer. As to these, the general principles governing the performance of ministerial duties must apply. Thus, continues Chief Justice MARSHALL, in the case already quoted from,<sup>1</sup> "when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts;—he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion sport away the vested rights of others."

In accordance with these principles, mandamus will lie to compel a governmental officer of this class to perform a ministerial duty, but it will not issue where the duty is a discretionary one, involving the exercise of judgment, or where his duty to perform the act in question is not clear and absolute.

Thus it lies against the postmaster-general to compel him to credit relators with certain fixed sums to which, by law, they are entitled;<sup>2</sup> and against the commissioner of patents to require him to prepare, sign and present to the secretary of the interior for his signature, a patent to which the commissioner has decided the relator is entitled.<sup>3</sup>

But the writ does not lie to require the secretary of the navy to revise a ruling of his predecessor and grant relator a pension to which, as he has been advised by the attorney-general, the relator is not entitled;<sup>4</sup> nor to the commissioner of pensions to require him to increase petitioner's pension where, after hearing, he has decided adversely to the claim;<sup>5</sup> nor to the commissioner of the general land office to compel him to issue a patent, where the right to it is yet unsettled and requires the exercise of judicial functions;<sup>6</sup> nor to the secretary of the treasury to require him to pay a claim for which no appropriation has been made.<sup>7</sup>

<sup>1</sup> *Marbury v. Madison*, 1 Cranch (U. S.) 137, 166.

<sup>2</sup> *Kendall v. United States*, 13 Peters (U. S.) 524.

<sup>3</sup> *Butterworth v. United States*, 112 U. S. 50.

<sup>4</sup> *Decatur v. Paulding*, 14 Peters (U. S.) 497.

<sup>5</sup> *United States v. Black*, 128 U. S. 40.

<sup>6</sup> *United States v. Commissioner*, 5 Wall. (U. S.) 563. See also *Browning v. McGarrahan*, 9 Wall. (U. S.) 298.

<sup>7</sup> *Reeside v. Walker*, 11 How. (U. S.) 272. See also *Kentucky v. Boutwell*, 13 Wall. (U. S.) 526; *United States v. Bayard*, 127 U. S. 251.

2. *To State Officers.*

## 1. Governor.

§ 954. Does not lie to control his official Discretion.—The question of how far the governor of a State is subject to the supervisory control of the courts through the writ of mandamus, is one of great importance and delicacy, and upon which the authorities are in conflict.

Under our political system the executive is, by the constitutions of the States, one of the co-ordinate branches of the government, each of which, within the sphere of its constitutional, governmental powers, is independent of the others. Within these limits, the legislative branch can not control the judicial, nor the judicial the legislative branch, nor either the executive. The governor of the State is, by the constitution, invested with certain important governmental or political powers and duties belonging to the executive branch of the government, the due performance of which is entrusted to his official honesty, judgment and discretion.

So far, therefore, as these governmental, political or discretionary powers and duties, which adhere and belong to the executive branch of the government, are concerned, it is universally agreed that the courts possess no power to supervise or control the governor in the manner of their discharge or exercise.<sup>1</sup>

<sup>1</sup> *Hawkins v. Governor*, 1 Ark. 570, 33 Am. Dec. 346; *Tennessee, &c. R. R. Co. v. Moore*, 36 Ala. 371; *State v. Warmoth*, 23 La. Ann. 1, 2 Am. Rep. 712; *a. c.* 24 La. Ann. 351, 13 Am. Rep. 126; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 39; *Rice v. Austin*, 19 Minn. 103, 18 Am. Rep. 330; *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 433; *Jonesboro, &c. Turnpike Co. v. Brown*, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; *Vicksburg, &c. R. R. Co. v. Lowry*, 61 Miss. 103, 43 Am. Rep. 76; *Middle-*

*ton v. Lowe*, 30 Cal. 596; *Wright v. Nelson*, 6 Ind. 496; *Baker v. Kirk*, 33 Ind. 517; *Gray v. State*, 72 Ind. 567; *Magruder v. Swann*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 572; *Chamberlain v. Sibley*, 4 Minn. 309; *Chumasero v. Potts*, 2 Mont. 243; *Wall v. Blasdel*, 4 Nev. 241; *Cotten v. Ellis*, 7 Jones (N. C.) L. 545; *State v. Chase*, 5 Ohio St. 528; *State v. Drew*, 17 Fla. 67; *Low v. Towns*, 8 Ga. 360; *People v. Bissell*, 19 Ill. 239; *People v. Yates*, 40 Ill. 126; *People v. Cullom*, 100 Ill. 473; *Dennett v. Governor*, 33 Me. 508; *Western R. R. Co. v. DeGraff*, 27

§ 955. **How in Case of ministerial Acts—Authorities against its Use.**—But there is still another class of powers and duties often imposed upon the governor which do not necessarily belong to his office as part of the functions of the chief executive, but which are created by express statutes and which, in many instances, might have been as well imposed upon any other of the State officers as upon the governor. Where these duties require the exercise of judgment or discretion, mandamus would not, of course, be issued to control it, even if it might issue to compel action. But many of the duties belonging to the class now under consideration, are positive ones, partaking largely, if not entirely, of a purely ministerial character. And it is as to these that the difficulty arises.

On the one hand, there is a large and respectable number of authorities which hold that mandamus will not issue to the governor to compel the performance by him of *any* act pertaining to his office, whether it be a discretionary one, or one of a purely ministerial character.<sup>1</sup> Indeed the cases of this class refuse to attempt a discrimination between those duties of the governor which are governmental or political in their character and those which are ministerial. Between these there is, it is said, no very clear and palpable line of distinction, "and if we should undertake to draw one, and to declare that in all cases falling on one side the line the governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation, and the cases would

Minn. 1; *State v. Governor*, 89 Mo. 388; *State v. Price*, 1 Dutch. (N. J.) 331; *Hartman's Appeal*, 85 Penn. St. 483; *Martin v. Ingham*, 38 Kans. 641; *State v. Johnson*, 28 La. Ann. 932; *State v. Moffitt*, 5 Ohio 358; *Miles v. Bradford*, 22 Md. 170; *State v. Champlin*, 2 Bail. (S. C.) 220; *Houston, &c. Co. v. Randolph*, 24 Tex. 817.

<sup>1</sup> *Hawkins v. Governor*, 1 Ark. 570, 30 Am. Dec. 346; *State v. Warmoth*, 23 La. Ann. 1, 2 Am. Rep. 712; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *State v. Warmoth*, 24 La. Ann. 851, 13 Am. Rep. 126; *People v. Gov-*

*ernor*, 29 Mich. 320, 18 Am. Rep. 89; *Jonesboro, &c. Turnpike Co. v. Brown*, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 718; *Vicksburg, &c. R. R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 76; *State v. Drew*, 17 Fla. 67; *Low v. Towns*, 8 Ga. 360; *People v. Blasell*, 19 Ill. 229; *People v. Yates*, 40 Ill. 126; *People v. Cullom*, 100 Ill. 472; *Dennet v. Governor*, 32 Me. 508; *Rice v. Austin*, 19 Minn. 103, 18 Am. Rep. 380; *Western R. R. Co. v. DeGraff*, 27 Minn. 1; *State v. Governor*, 39 Mo. 388; *State v. Price*, 1 Dutch. (N. J.) 331.

be numerous in which neither the governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would be appealed to by every dissatisfied party to subject a co-ordinate department of the government to their jurisdiction. However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons."<sup>1</sup>

In accordance with these views it has been either expressly decided or tacitly assumed that mandamus will not be issued to the governor to compel him to issue a commission to a public officer alleged to be entitled to it;<sup>2</sup> or to issue or deliver the bonds of the State to persons who allege that they are by law entitled to receive them;<sup>3</sup> or to canvass votes and declare the applicant elected;<sup>4</sup> or to deposit a bill in the office of the secretary of state;<sup>5</sup> or to call an election;<sup>6</sup> or to make requisition upon the state treasurer for the payment of funds;<sup>7</sup> or to make a certificate that public work has been, as is admitted, performed according to contract;<sup>8</sup> or to execute and deliver a deed of lands to persons claiming a right to them;<sup>9</sup> or to subscribe, in the name of the State, to stock in a corporation in pursuance of an act of the legislature;<sup>10</sup> or to convene a court-martial.<sup>11</sup>

§ 956. *Same Subject—Authorities permitting its Use.*—But, on the other hand, it is held by a large number of cases, if not by the weight of authority, that where a positive duty of a merely ministerial character is imposed upon the governor, its perform-

<sup>1</sup> Per COOLEY, J. in *People v. Governor*, 20 Mich. 320, 18 Am. Rep. 89.

<sup>2</sup> *Hawkins v. Governor*, 1 Ark. 570, 33 Am. Dec. 346; *State v. Drew*, 17 Fla. 67; *Low v. Towns*, 8 Ga. 360; *State v. Governor*, 39 Mo. 888.

<sup>3</sup> *Jonesboro, &c. Turnpike Co. v. Brown*, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; *People v. Bissell*, 19 Ill. 239.

<sup>4</sup> *Dennett v. Governor*, 32 Me. 508.

<sup>5</sup> *People v. Yates*, 40 Ill. 136.

<sup>6</sup> *People v. Cullom*, 100 Ill. 472.

<sup>7</sup> *Vicksburg, &c. R. R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 76.

<sup>8</sup> *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 89.

<sup>9</sup> *Rice v. Austin*, 19 Minn. 103, 18 Am. Rep. 330.

<sup>10</sup> *State v. Warmoth*, 34 La. Ann. 351, 13 Am. Rep. 126.

<sup>11</sup> *Mauran v. Smith*, 3 R. I. 192, 5 Am. Rep. 564.

ance may be enforced by mandamus in the same manner as against any other public officer.<sup>1</sup> A ministerial act in this connection has been well defined to be "one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed."<sup>2</sup>

"It will be readily admitted," it is said in one case, "that the courts cannot control any executive act of the governor, or any executive power conferred upon him. But may they not control ministerial power wherever placed? Is not ministerial power always inferior to judicial power, and subject to judicial control? The recipient of ministerial power exercises no judgment, no discretion, but is simply bound to obey the law under a given state of facts; and to construe this law, and to ascertain these facts, are peculiarly within the province of the courts. If an applicant for relief on the ground of the refusal to exercise or the wrongful exercise of ministerial power by the governor has no remedy in the courts, then he has no remedy at all. The remedy of impeachment, and the remedy of subsequent elections, suggested by some of the courts, may be a remedy to the public in general, but it cannot be a remedy to an individual sufferer for injuries or loss in person or to his property."<sup>3</sup>

In accordance with such views it has been held that the governor may be compelled by mandamus to perform a positive duty of a ministerial character,<sup>4</sup> as to accept a bond and draw an order upon compliance with fixed conditions;<sup>5</sup> or to sign and issue a patent for lands to one lawfully entitled to it;<sup>6</sup> or to

<sup>1</sup> Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 433; Middleton v. Lowe, 30 Cal. 596; Tennessee R. R. Co. v. Moore, 86 Ala. 371; Wright v. Nelson, 6 Ind. 496; Baker v. Kirk, 33 Ind. 517; Gray v. State, 73 Ind. 567. Magruder v. Swann, 25 Md. 173; Groome v. Gwinn, 43 Md. 572; Chamberlain v. Sibley, 4 Minn. 309; Chummasero v. Potts, 2 Mont. 242; Wall v. Blasdel, 4 Nev. 241; Cotten v. Ellis,

7 Jones (N. C.) L. 545; State v. Chase, 5 Ohio St. 528.

<sup>2</sup> Per VALENTINE, J. in Martin v. Ingham, 38 Kans. 641, 651.

<sup>3</sup> Per VALENTINE, J. in Martin v. Ingham, 38 Kans. 641, 653.

<sup>4</sup> Martin v. Ingham, 38 Kans. 641.

<sup>5</sup> Tennessee, &c. R. R. Co. v. Moore, 36 Ala. 371.

<sup>6</sup> Wall v. Blasdel, 4 Nev. 241; Middleton v. Low, 30 Cal. 596.

authenticate a statute as required by law;<sup>1</sup> or to issue a commission to an officer entitled to receive it;<sup>2</sup> or to deliver<sup>3</sup> or pay<sup>4</sup> bonds in conformity to a statute; or to canvass a vote as was his duty;<sup>5</sup> or to issue a warrant for salary to one having a clear right to demand it;<sup>6</sup> or to issue a proclamation that a corporation was entitled to do business.<sup>7</sup>

## 2. Other State Officers.

§ 957. **Lies to enforce ministerial but not discretionary Duties.**—The authority of courts to control the action of other State officers by mandamus has, in some States,<sup>8</sup> been entirely denied; but the better opinion seems clearly to be that while the courts will not undertake to control the exercise of judgment or discretion,<sup>9</sup> nor compel the performance of doubtful or uncertain duties, they may, by this writ, enforce the performance by State officers of ministerial duties which the law clearly imposes.<sup>10</sup>

§ 958. **1. To Secretary of State.**—Thus the writ will issue against the secretary of state to compel the performance of a clear duty of a ministerial nature, as to furnish a copy of the laws for publication,<sup>11</sup> or to authenticate a commission duly granted,<sup>12</sup> or to revoke a license issued to a foreign corporation but which has been clearly forfeited,<sup>13</sup> or to issue a certificate of

<sup>1</sup> Harpending v. Haight, 89 Cal. 189, 2 Am. Rep. 432.

<sup>2</sup> Wright v. Nelson, 6 Ind. 496; Baker v. Kirk, 88 Ind. 517; Magruder v. Swann, 25 Md. 178; Groome v. Gwinn, 48 Md. 572.

<sup>3</sup> Chamberlain v. Sibley, 4 Minn. 309.

<sup>4</sup> Gray v. State, 73 Ind. 567.

<sup>5</sup> Chumasero v. Potts, 2 Mont. 242.

<sup>6</sup> Cotten v. Ellis, 7 Jones (N. C.) L. 545.

<sup>7</sup> State v. Chase, 5 Ohio St. 528.

<sup>8</sup> Commonwealth v. Wickersham, 90 Penn. St. 811; Chalk v. Darden, 47 Tex. 438; Galveston, &c., Co. v. Gross, 47 Tex. 428; Bledsoe v. International R. R. Co., 40 Tex. 537;

Railroad Co. v. Randolph, 24 Tex. 817. See also State v. Braden, — Minn. —, 41 N. W. Rep. 817.

<sup>9</sup> State v. Gregory, 88 Mo. 128, 53 Am. Rep. 565; State v. State Medical Board, 82 Minn. 824, 50 Am. Rep. 575.

<sup>10</sup> Martin v. Ingham, 88 Kans. 641; State v. Doyle, 40 Wis. 175, 220; State v. Wrotnowski, 17 La. Ann. 156; State v. Houston, 40 La. Ann. 398, 8 Am. St. Rep. 532.

<sup>11</sup> State v. Barker, 4 Kans. 379.

<sup>12</sup> State v. Wrotnowski, 17 La. Ann. 156.

<sup>13</sup> State v. Doyle, 40 Wis. 175, and 220.

election to one entitled to it,<sup>1</sup> or to certify an account as required by law.<sup>2</sup> But it will not issue to compel him to certify as a law that which he does not officially know to be such,<sup>3</sup> or to promulgate a law whose validity and authenticity are in grave doubt,<sup>4</sup> or to issue a patent which it is the duty of the governor to issue,<sup>5</sup> or to compel him to receive materials under a contract which the State has repudiated.<sup>6</sup>

§ 959. 2. To State Treasurer.—The same general principles apply to the state treasurer. Thus the writ may be granted to compel the performance of a clear and imperative duty, as to issue bonds of the State to a railway which has complied with the requirements entitling it to them,<sup>7</sup> or to pay warrants where there is no question as to his duty,<sup>8</sup> or to surrender to a municipality bonds deposited by it and of which it is entitled to a return,<sup>9</sup> or to accept in payment of taxes the amount legally due.<sup>10</sup>

But the writ will only be issued where the duty is unquestionable and clearly defined,<sup>11</sup> and it will not, therefore, be granted to compel payment of funds in the absence of the necessary appropriation,<sup>12</sup> or of an indispensable special act authorizing it,<sup>13</sup> nor where he has been forbidden by the legislature to make the payment,<sup>14</sup> nor where the fund from which payment is required is exhausted.<sup>15</sup>

So the writ will not be issued to compel payment where the treasurer is required to investigate and decide upon the merits of the claim before payment and has decided against it.<sup>16</sup>

§ 960. 3. To State Auditor.—Upon the same principles, an

<sup>1</sup> *State v. Lawrence*, 8 Kans. 95.

<sup>2</sup> *State v. Secretary of State*, 33 Mo. 208.

<sup>3</sup> *People v. Hatch*, 33 Ill. 9.

<sup>4</sup> *State v. Dealonde*, 37 La. Ann. 71.

<sup>5</sup> *Crane v. Secretary of State*, 51 Mich. 195.

<sup>6</sup> *People v. Secretary of State*, 53 Ill. 20.

<sup>7</sup> *Northwestern, &c., R. R. Co. v. Jenkins*, 65 N. C. 173.

<sup>8</sup> *State v. Dubuclet*, 26 La. Ann. 137.

<sup>9</sup> *Bay City v. State Treasurer*, 33 Mich. 499; *LaGrange v. State Treasurer*, 34 Mich. 468.

<sup>10</sup> *State v. Francis*, 23 Kans. 495, 94 Id. 750.

<sup>11</sup> *Brealer v. Butler*, 60 Mich. 40.

<sup>12</sup> *Weston v. Dane*, 51 Me. 461.

<sup>13</sup> *State v. Bishop*, 49 Mo. 504.

<sup>14</sup> *Wilson v. Jenkins*, 73 N. C. 5.

<sup>15</sup> *Huff v. Kimball*, 39 Ind. 411; *State v. State Treasurer*, 33 La. Ann. 177.

<sup>16</sup> *Louisiana College v. State Treasurer*, 3 La. 394.

auditor of state may be compelled by mandamus to issue orders and warrants in payment of salaries and other claims against the State where the right to such payment is clearly fixed or ascertained,<sup>1</sup> or to furnish bank notes to a bank which has complied with all the requirements of the law,<sup>2</sup> or to make a conveyance of lands to one legally entitled thereto,<sup>3</sup> or to advertise for bids for doing public work;<sup>4</sup> or to reject taxes unlawfully levied.<sup>5</sup>

But it will not be granted to compel payment of an unlawful charge,<sup>6</sup> nor where there is no money appropriated out of which it can be paid,<sup>7</sup> nor where the matter in controversy is one left to his discretion.<sup>8</sup>

§ 961. 4. To Attorney-General.—Mandamus will not issue to control the discretion of the attorney-general, as in determining whether or not to institute proceedings in *quo warranto*.<sup>9</sup>

§ 962. 5. To Commissioner of Insurance.—The transaction of the insurance business in most, if not all, of the States is now regulated by express statutes which usually create an insurance department or bureau in charge of a special superintendent or commissioner, whose license or authority is necessary to enable a company to transact business. These provisions, while similar in their general character and purpose, vary greatly in the details of their enforcement.

Where, under the statutes applicable to a particular case, the regulation of the business or the granting of a license is a matter entrusted to the discretion of the commissioner or superintendent, he may, as in other cases, be compelled to act, but he

<sup>1</sup> People v. Schuyler, 79 N. Y. 189; Smith v. Strobach, 50 Ala. 463; Bryan v. Cattell, 15 Iowa 538; State v. Gamble, 18 Fla. 9; Danley v. Whiteley, 14 Ark. 687; People v. Auditor-General, 9 Mich. 141; Lachance v. Auditor-General, — Mich. —, 48 N. W. Rep. 1005.

<sup>2</sup> Citizens' Bank v. Wright, 6 Ohio St. 318.

<sup>3</sup> McCulloch v. Stone, 64 Miss. 378.

<sup>4</sup> Ayres v. Auditors, 43 Mich. 423.

<sup>5</sup> People v. Auditor-General, 9 Mich.

<sup>6</sup> People v. Hatch, 33 Ill. 9.

<sup>7</sup> State v. Jumel, 81 La. Ann. 142.

<sup>8</sup> Ambler v. Auditor General, 38 Mich. 746; Houghton County v. Auditor-General, 36 Mich. 271; People v. Adam, 8 Mich. 427. See also Ottawa Supervisors v. Auditor-General, 69 Mich. —.

<sup>9</sup> People v. Attorney-General, 41 Mich. 728; People v. Attorney-General, 23 Barb. (N. Y.) 114; People v. Fairchild, 67 N. Y. 334. See Coon v. Attorney-General, 43 Mich. 65.



will not be compelled to act in any particular way, nor will his lawful discretion in granting, refusing or revoking authority to do business be controlled by mandamus.<sup>1</sup> Where, however, the granting of the license is a mere ministerial duty, to be performed upon fixed conditions, mandamus will lie.<sup>2</sup>

If the authority to revoke a license is to be exercised after certain proceedings and hearings are had as provided by law, it can be exercised only when these conditions have been complied with.<sup>3</sup>

### 3. *To County Officers.*

§ 963. In general.—The same general principles apply also to the various officers of counties,—the writ being granted to compel the performance of clear and specific ministerial duties, and denied to control discretion or to enforce doubtful or uncertain rights. Thus—

§ 964. 1. *To County Treasurer.*—The writ will go to the county treasurer to require him to pay other officers their salaries and fees as provided by law;<sup>4</sup> to pay orders and warrants properly drawn upon him for the payment of debts and demands against the county;<sup>5</sup> to require him to keep his office at the county seat;<sup>6</sup> to assign tax certificates to a purchaser entitled to them;<sup>7</sup> to require him to pay over to the proper local officers the amount of liquor taxes to which by law they are entitled;<sup>8</sup> to compel him to permit a citizen having an interest therein to inspect liquor dealers' bonds deposited in his office;<sup>9</sup> or to require him to pay a judgment against the county.<sup>10</sup>

<sup>1</sup>Insurance Company v. Wilder, 40 Kans. 561.

<sup>2</sup>See Employers' Assur. Co. v. Commissioner of Insurance, 64 Mich. 614; Hartford Fire Ins. Co. v. Commissioner of Insurance, 70 Mich. —, 14 West. Rep. 682.

<sup>3</sup>National Life Ins. Co. v. Commissioner of Insurance, 25 Mich. 321.

<sup>4</sup>Baker v. Johnson, 41 Me. 15; People v. Edmonds, 15 Barb. (N. Y.) 539; State v. Ocean Co. 48 N. J. L. 730; State v. Orleans Judge, 38 La. Ann. 43.

<sup>5</sup>State v. Philbrick, — N. J. —, 8 Atl. Rep. 123; School District v. Root, 61 Mich. 378; Byington v. Hamilton, 27 Kans. 758; Port Huron v. Runnells, 57 Mich. 46; Hon v. State, 89 Ind. 249; State v. Roderick, 28 Neb. 505.

<sup>6</sup>Rice v. Shay, 43 Mich. 380.

<sup>7</sup>State v. Magill, 4 Kans. 415.

<sup>8</sup>East Saginaw v. County Treasurer, 44 Mich. 273.

<sup>9</sup>Brown v. County Treasurer, 54 Mich. 132, 52 Am. Rep. 800.

<sup>10</sup>Brown v. Crego, 32 Iowa 498.

But he can not be compelled to pay without the proper warrant;<sup>1</sup> nor to pay a warrant issued without authority of law,<sup>2</sup> or for a demand not legally chargeable against the county,<sup>3</sup> or allowed by a body having no authority,<sup>4</sup> or obtained through fraud.<sup>5</sup>

Where mandamus is sought to require the payment of specific funds, it must be shown that they have come into the treasurer's possession.<sup>6</sup>

§ 965. 2. To County Clerk.—So the clerk of the county, who is usually clerk of the courts also, will be compelled to perform ministerial duties, such as to receive and file papers which by law are to be filed in his office,<sup>7</sup> or to approve of bonds where no discretion is to be exercised,<sup>8</sup> or to issue process to a party entitled to it,<sup>9</sup> or to permit inspection of his records to a person having a special interest therein,<sup>10</sup> or to furnish copies thereof upon lawful demand,<sup>11</sup> or to issue a certificate of election to one by law entitled to receive it,<sup>12</sup> or to transfer the proper records to a new county.<sup>13</sup>

But the writ will not be granted to compel the issuing of a certificate of election where, if issued, it would give no substantial relief,<sup>14</sup> nor to compel the approval of bonds where the question is one confided to the discretion of the clerk,<sup>15</sup> though he may be compelled to pass upon it,<sup>16</sup> nor to make a transcript of a record where the party has another adequate remedy by writ of error,<sup>17</sup> nor to issue process where the right to it is doubtful.<sup>18</sup>

So the writ will go to compel the clerk to call an election

<sup>1</sup> *People v. Fogg*, 11 Cal. 351.

<sup>2</sup> *Honea v. Monroe County*, 63 Miss. 171.

<sup>3</sup> *Keller v. Hyde*, 20 Cal. 593.

<sup>4</sup> *People v. Lawrence*, 6 Hill (N. Y.) 244. See also *Mead v. County Treasurer*, 36 Mich. 416.

<sup>5</sup> *People v. Wendell*, 71 N. Y. 171.

<sup>6</sup> *Minneapolis, &c., Ry. Co. v. County Treasurer*, — Iowa —, 39 N. W. Rep. 260.

<sup>7</sup> *People v. Fletcher*, 3 Scam. (Ill.) 482.

<sup>8</sup> *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49.

<sup>9</sup> *Attorney-General v. Lum*, 2 Wis. 507; *People v. Loucks*, 23 Cal. 68.

<sup>10</sup> *State v. Hoblitzelle*, 85 Mo. 620.

<sup>11</sup> *State v. Meagher*, 57 Vt. 398.

<sup>12</sup> *People v. Rives*, 27 Ill. 242.

<sup>13</sup> *Hooten v. McKinney*, 5 Nev. 194.

<sup>14</sup> *Sherburne v. Horn*, 45 Mich. 160.

<sup>15</sup> *Swan v. Gray*, 44 Miss. 398.

<sup>16</sup> *Mobile Ins. Co. v. Cleveland*, 76 Ala. 321.

<sup>17</sup> *State v. Engleman*, 45 Mo. 27. See also *Wright v. Clark*, 48 Mich. 642.

<sup>18</sup> *Hall v. Stewart*, 23 Kana. 396.

where his duty is clear,<sup>1</sup> but not where it would be unavailing as where no election districts have been established.<sup>2</sup>

§ 966. 3. To Recorders of Deeds.—So the writ will be issued to compel a recorder of deeds to perform ministerial acts, such as to record a conveyance lawfully entitled to record,<sup>3</sup> to permit an inspection of the records by a person having a special interest in particular instruments or chains of title;<sup>4</sup> or to permit the recorder of a new county organized out of the old to make transcripts of such of the records as relate to the new county.<sup>5</sup>

But, as has been seen, it will not be granted to compel the officer to permit abstracts of all the records of his office to be made for the purpose of private gain,<sup>6</sup> nor to discharge a mortgage of record where the facts in regard to the right are in controversy;<sup>7</sup> nor to record a deed which was delivered to him, not in an official capacity, but in *escrow*,<sup>8</sup> nor to erase a tax sale before final judgment as to its validity.<sup>9</sup>

§ 967. 4. To Sheriffs.—Mandamus will also be granted to compel a sheriff to perform definite and positive duties, as to keep his office at the county seat;<sup>10</sup> to appoint appraisers<sup>11</sup> and cause appraisal to be made<sup>12</sup> in order that exemptions may be selected; to make a sale of mortgaged lands in one parcel;<sup>13</sup> to imprison a defendant when necessary to compel him to secure the relator the relief to which he is entitled;<sup>14</sup> to execute and deliver a deed of lands sold by him to the purchaser though he has previously made a deed of the same land to another;<sup>15</sup> to execute and serve proper process;<sup>16</sup> or to permit a prisoner to see and consult with his counsel.<sup>17</sup>

<sup>1</sup> State v. Ware, 18 Oreg. 330.

<sup>2</sup> State v. Emery, 20 Neb. 801.

<sup>3</sup> Strong's Case, Kirby (Conn.) 845;  
*Ex parte Goodell*, 14 Johns. (N. Y.) 825.

<sup>4</sup> Boylan v. Warren, 89 Kans. 301, 7  
Am. St. Rep. 551; see *ante*, § 733.

<sup>5</sup> State v. Meadows, 1 Kans. 90.

<sup>6</sup> See *ante*, § 739.

<sup>7</sup> People v. Miller, 43 Hun (N. Y.)  
463.

<sup>8</sup> People v. Curtis, 41 Mich. 723.

<sup>9</sup> State v. Batt, 40 La. Ann. 582.

<sup>10</sup> State v. Walker, 5 S. O. 263.

<sup>11</sup> People v. McClay, 2 Neb. 7.

<sup>12</sup> Pudney v. Burkhart, 62 Ind. 179.

<sup>13</sup> Morris v. Womble, 30 La. Ann.  
1312.

<sup>14</sup> Waite v. Washington, 44 Mich. 333.

<sup>15</sup> People v. Fleming, 4 Denio (N. Y.)  
187.

<sup>16</sup> North Pacific R. R. Co. v. Gard-  
ner, —, 31 Pac. Rep. 735; Fremont v.  
Crippen, 10 Cal. 212, 70 Am. Dec. 711.

<sup>17</sup> People v. Risley, 66 How. Pr. (N.  
Y.) 67.

But the writ will not be issued to compel the sheriff to perform doubtful duties or unlawful acts, as to issue a deed or serve a writ in favor of one whose right to it is in dispute<sup>1</sup> or to insert in the deed recitals contradicted by his return.<sup>2</sup> Neither will it issue where the party has another adequate remedy at law, and for this reason mandamus to compel a sheriff to levy an execution has been refused.<sup>3</sup>

#### 4. *To County and other Boards and Bodies.*

§ 968. **Granted to require Performance of ministerial Duties, but not to control Discretion.**—The same principles apply to official boards and bodies as to individual officers,—the performance of clear and definite duties of a ministerial nature will be compelled, but discretion will not be interfered with nor will doubtful or uncertain duties be required.

Thus the writ will be granted against a board of supervisors, auditors or freeholders to compel them to draw an order or warrant for the payment of an allowed claim,<sup>4</sup> to deliver the warrant to the person entitled to it,<sup>5</sup> to apportion according to law a tax to be raised,<sup>6</sup> to spread upon the tax rolls a sum required to be raised by taxation,<sup>7</sup> to allow a claim in regard to which they have no discretion,<sup>8</sup> to admit a person whose right to a seat has been duly determined,<sup>9</sup> to provide for the payment of a credit due to a township transferred to another county,<sup>10</sup> to levy a tax to pay a judgment recovered against the county,<sup>11</sup> to hear applications for refunding taxes illegally assessed,<sup>12</sup> and to refund them where the right is clear,<sup>13</sup> to subscribe to stock in a railway company where

<sup>1</sup> Williams v. Smith, 6 Cal. 91; State v. Craft, 17 Fla. 722.

<sup>2</sup> Hewell v. Lane, 53 Cal. 218.

<sup>3</sup> Habersham v. Sears, 11 Oreg. 481, 50 Am. Rep. 481. See also State v. Craft, 17 Fla. 722.

<sup>4</sup> State v. Titus, 47 N. J. L. 89.

<sup>5</sup> People v. Auditors, 5 Mich. 228.

<sup>6</sup> Auditor-General v. Supervisors, 24 Mich. 237.

<sup>7</sup> People v. Supervisors, 30 Mich. 288.

<sup>8</sup> People v. Supervisors, 3 Mich.

475; People v. Auditors, 18 Mich.

238; People v. Auditors, 82 N. Y. 80.

<sup>9</sup> Robinson v. Supervisors, 49 Mich. 321.

<sup>10</sup> Higgins v. Supervisors, 53 Mich. 16.

<sup>11</sup> Labette County Commissioners v. Moulton, 112 U. S. 217.

<sup>12</sup> People v. Supervisors, 70 N. Y. 228.

<sup>13</sup> People v. Supervisors, 51 N. Y. 401.

their duty is plain,<sup>1</sup> or to provide by tax for the payment of county bonds.<sup>2</sup>

But the writ will not be granted to control the lawful judgment or discretion of such boards or bodies in fixing the compensation of officers,<sup>3</sup> in passing upon claims against the political bodies which they represent,<sup>4</sup> in passing upon the sufficiency of bonds,<sup>5</sup> or in letting contracts.<sup>6</sup>

So the writ will not go to require them to audit a claim which is not properly a charge against the county,<sup>7</sup> nor to correct assessments after the matter has passed out of their hands, and the collection of the tax has been begun.<sup>8</sup>

### 5. *To Municipal Officers.*

§ 969. *In general.*—Mandamus is most often sought against municipal officers when the purpose is to enforce, through them, the performance of some duty incumbent upon the municipal corporation. This subject is not within the scope of this treatise, but will be found fully considered in the excellent works of Judge DILLON on Municipal Corporations and Mr. High on Extraordinary Legal Remedies.

Some questions are, however, germane to the present endeavor. Thus—

§ 970. *Granted to enforce ministerial Duty but not to control Discretion.*—Mandamus will go to compel the mayor of a city to perform the ministerial act of signing a license which has been duly granted by the proper authorities;<sup>9</sup> or to order an election, where the facts, which make it his duty to do so, exist;<sup>10</sup>

<sup>1</sup> Napa Valley R. Co. v. Supervisors, 80 Cal. 485.

<sup>2</sup> Robinson v. Supervisors, 48 Cal. 353.

<sup>3</sup> Cicotte v. Wayne County, 59 Mich. 509.

<sup>4</sup> People v. Auditors, 10 Mich. 307; Mixer v. Supervisors, 26 Mich. 422; Videto v. Supervisors, 31 Mich. 116; Barry County v. Supervisors, 33 Mich. 497; Clark v. Supervisors, 38 Mich. 658; People v. Johnson, 17 Cal. 305.

<sup>5</sup> Arapahoe County v. Crotty, 9 Colo. 318.

<sup>6</sup> State v. McGrath, 91 Mo. 386; Mayo v. Commissioners, 141 Mass.

74; Hanlin v. Charles City, 66 Iowa 69.

<sup>7</sup> People v. Auditors, 73 N. Y. 310.

<sup>8</sup> Life Ins. Co. v. Supervisors, 24 Barb. (N. Y.) 166.

<sup>9</sup> Braconier v. Packard, 136 Mass. 50.

<sup>10</sup> Sansom v. Mercer, 63 Tex. 488, 3 Am. St. Rep. 505.

or to deliver the corporate seal of the corporation to his successor;<sup>1</sup> to issue bonds in payment for land condemned;<sup>2</sup> or to appoint commissioners for the performance of a public duty as provided by statute.<sup>3</sup>

But the writ will not be granted to control the discretionary powers vested in the mayor,<sup>4</sup> nor where there is an ample remedy at law.<sup>5</sup>

So the writ will issue to compel municipal officers to enforce the city ordinances,<sup>6</sup> or to compel the municipal treasurer to pay proper orders and warrants.<sup>7</sup>

### 6. *To Taxing Officers.*

§ 971. *Lies to compel Levy of Tax to pay established Claims.*—So it is well settled that mandamus will be granted to compel the proper officers of municipal corporations, such as counties, cities and townships, to levy a tax to provide for the payment of established claims against the municipality, as to pay municipal bonds, warrants and orders and to pay judgments rendered against it.<sup>8</sup>

But the writ will not be granted where the right is not clear or established, and the municipality has not been heard.<sup>9</sup>

<sup>1</sup> *People v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769.

<sup>2</sup> *Duncan v. Mayor*, 8 Bush (Ky.) 98.

<sup>3</sup> *Mayor v. State*, 4 Ga. 26.

<sup>4</sup> *Commonwealth v. Henry*, 49 Penn. St. 530.

<sup>5</sup> *People v. Wood*, 35 Barb. (N. Y.) 653.

<sup>6</sup> *State v. Francis*, 95 Mo. 44.

<sup>7</sup> *State v. Roderick*, 23 Neb. 505; *Byington v. Hamilton*, 37 Kana. 758; *Port Huron v. Runnells*, 57 Mich. 46; *Hon v. State*, 89 Ind. 249; *School District v. Root*, 61 Mich. 373.

<sup>8</sup> *Walkley v. Muscatine*, 6 Wall.

(U. S.) 481; *Riggs v. Johnson County*, *Id.* 166; *Weber v. Lee County*, *Id.* 210; *United States v. Keokuk*, *Id.* 514; *Amy v. Des Moines County Supervisors*, 11 Wall. (U. S.) 136; *Greenfield v. State*, 118 Ind. 597; *Shelley v. St. Charles County*, 30 Fed. Rep. 603; *Deere v. Rio Grande County*, 33 Fed. Rep. 823; *State v. Rahway*, 49 N. J. L. 334; *State v. Jacksonville*, 23 Fla. 21; *Harshman v. Knox County*, 123 U. S. 306; *Lehigh Coal Co.'s Appeal*, 112 Penn. St. 360.

<sup>9</sup> *Cassatt v. Barber County*, 39 Kana. 505.

7. *To School Officers.*

§ 972. *Lies to compel Performance of Duty.*—Mandamus is frequently resorted to to compel boards of trustees and other officers, having charge of the public schools, to perform their legal duties. Thus it will be issued to compel a school board to provide school facilities where this is made their legal duty,<sup>1</sup> and to do so and admit scholars therein, without discrimination as to color,<sup>2</sup> though, in the absence of other discrimination, there is no legal objection to providing separate schools for colored scholars,<sup>3</sup> or to grading the scholars according to age or attainments;<sup>4</sup> to compel the board to reinstate a teacher wrongfully discharged<sup>5</sup> or a scholar excluded in pursuance of a rule which the board had no authority to adopt;<sup>6</sup> to compel the board to adopt the textbooks which the law prescribes,<sup>7</sup> and, when once adopted, to permit scholars to use those books until others are lawfully adopted in their stead.<sup>8</sup>

But the writ will not be granted where it would be unavailing, as to reinstate scholars in a term of school which will expire before a hearing can be had,<sup>9</sup> or to compel school to be held in the appointed place where it has been but temporarily removed and the term has nearly expired.<sup>10</sup>

Where school officers are invested with discretionary powers, the courts will not attempt to control their discretion, but it will compel them to take action.<sup>11</sup>

<sup>1</sup> *Maddox v. Neal*, 45 Ark. 121, 55 Am. Rep. 540.

<sup>2</sup> *Maddox v. Neal*, 45 Ark. 121, 55 Am. Rep. 540; *People v. Board of Education*, 18 Mich. 400; *State v. Duffy*, 7 Nev. 842, 8 Am. Rep. 718; *Clark v. Directors*, 24 Iowa 266; *Smith v. Directors*, 40 Iowa 518; *Dove v. School District*, 41 Iowa 689.

<sup>3</sup> *Ward v. Flood*, 48 Cal. 86, 17 Am. Rep. 405.

<sup>4</sup> *People v. Board of Education*, 18 Mich. 400.

<sup>5</sup> *Gilman v. Bassett*, 33 Conn. 296; *Morley v. Power*, 5 Lee (Tenn.) 691.

<sup>6</sup> *Perkins v. Board of Directors*, 56 Iowa 476; *Trustees v. People*, 87 Ill. 303, 29 Am. Rep. 55.

<sup>7</sup> *State v. School Directors*, 74 Mo. 21.

<sup>8</sup> *State v. Board of Education*, 35 Ohio St. 368.

<sup>9</sup> *Christman v. Peck*, 90 Ill. 150.

<sup>10</sup> *Colt v. Roberts*, 38 Conn. 330.

<sup>11</sup> *Case v. Blood*, 71 Iowa 682; *Eden v. Templeton*, 73 Iowa 637.

8. *To Election Officers.*

§ 973. *Lies to compel Performance of ministerial Duties.*—It has been already seen<sup>1</sup> that mandamus is not the remedy to try the title to public office, nor to compel admission to a disputed office.

But, as has also been seen, the officers of election who are charged with the performance of ministerial duties, as to make a full and true canvass of the votes,<sup>2</sup> or to make returns thereof,<sup>3</sup> or to declare the result,<sup>4</sup> or to issue a certificate to the one receiving the highest number of votes,<sup>5</sup> may be compelled by mandamus to perform their duty.

But the writ will not be granted to compel the performance of duties confided to their judgment or discretion,<sup>6</sup> nor will it be granted before the performance of the duty is due, nor where, if granted, it would be unavailing.<sup>7</sup>

The writ will lie to the recorder of votes to require him to permit the lists of voters to be inspected or copied.<sup>8</sup>

9. *To Judicial Officers.*

§ 974. *Judicial Discretion not interfered with.*—It has been seen in a preceding section that mandamus will not be issued to control the discretion with which any public officer is by law invested. And this is particularly true of that class of officers

<sup>1</sup> See *ante*, § 478.

<sup>2</sup> *State v. Gibbs*, 18 Fla. 55, 7 Am. Rep. 233; *Lewis v. Commissioners*, 16 Kana. 103, 23 Am. Rep. 275; *Hudmon v. Slaughter*, 70 Ala. 546; *Kisler v. Cameron*, 39 Ind. 438; *Clark v. McKenzie*, 7 Bush (Ky.) 523; *State v. Robinson*, 1 Kana. 17; *State v. Canvassers*, 36 Wis. 493; *State v. Garesche*, 65 Mo. 430; *State v. Stearns*, 11 Neb. 104; *State v. Berg*, 76 Mo. 136.

<sup>3</sup> *State v. Circuit Judge*, 9 Ala. 338; *In re Strong*, 30 Pick. (Mass.) 434.

<sup>4</sup> *State v. Gibbs*, 18 Fla. 55, 7 Am. Rep. 233; *State v. Garesche*, 65 Mo. 430.

<sup>5</sup> *People v. Rives*, 27 Ill. 242; *State v. Lawrence*, 3 Kana. 95; *Clark v. McKenzie*, 7 Bush (Ky.) 523; *Ellis v. Commissioners*, 3 Gray (Mass.) 370; *State v. Gibbs*, 18 Fla. 55, 7 Am. Rep. 233; *In re Strong*, 30 Pick. (Mass.) 434; *People v. Hilliard*, 29 Ill. 419.

<sup>6</sup> *Arberry v. Beavers*, 6 Tex. 457; *Mayor v. Rainwater*, 47 Miss. 547; *State v. Selectmen*, 25 La. Ann. 810.

<sup>7</sup> *Peters v. Canvassers*, 17 Kana. 365.

<sup>8</sup> *State v. Hoblitzelle*, 35 Mo. 624; *State v. Williams*, — Mo. —, 8 S. W. Rep. 771.



whose functions are properly designated as judicial. Wherever, therefore, the law has clothed an inferior court, magistrate or judicial officer with power and duty to act or decide according to his discretion or judgment, and wherever such court, magistrate or officer has duly acted in reference to a matter so intrusted to him according to his judgment or discretion, mandamus will not be granted, in the one case, to control, direct or coerce that discretion or judgment or compel it to take any particular action or to come to any designated conclusion, or, in the other case, to compel an alteration, change or revision of the results to which such judgment or discretion has led.<sup>1</sup>

§ 975. **Judicial Officer may be compelled to act.**—But while a judicial officer will not be compelled to act in any particular way or to reach any designated conclusion, and while when he has once acted he will not be compelled to act again or alter his decision, he cannot refuse to act at all in a case properly within his jurisdiction, and if he does, mandamus will be granted to compel him to act,—to set him in motion, to compel him to exercise his judgment or discretion in reference to the particular matter which by law is confided to it.<sup>2</sup>

§ 976. **Judicial Officer may be compelled to perform ministerial Acts.**—So where, as is frequently the case, the law has imposed upon a judicial officer the duty of performing certain acts of a ministerial nature which do not depend upon his judgment or discretion but are absolutely imposed by positive enactments, the performance of such a specific duty may be compelled as in other cases.

Thus a judicial officer may be compelled to correct clerical

<sup>1</sup> *People v. Pratt*, 28 Cal. 166, 87 Am. Dec. 110; *Weeden v. Richmond*, 9 R. I. 128, 98 Am. Dec. 878; *People v. Pearson*, 2 Scam. (Ill.) 189, 83 Am. Dec. 445; *Commonwealth v. Boone*, City Court, 82 Ky. 632; *State v. Megown*, 89 Mo. 156; *State v. St. Louis Court of Appeals*, 87 Mo. 374; *State v. Young*, 84 Mo. 90; *People v. Judge*, 1 Mich. 859; *Mabley v. Judge*, 82

Mich. 190; *Wiley v. Judge*, 39 Mich. 487; *Olson v. Judge*, 49 Mich. 85.

<sup>2</sup> *Ex parte Mahone*, 80 Ala. 49, 68 Am. Dec. 111; *Weeden v. Richmond*, 9 R. I. 128, 98 Am. Dec. 878; *People v. Barnes*, 66 Cal. 594; *State v. Weber*, — Minn. —, 87 N. W. Rep. 949; *Lloyd v. Judge*, 56 Mich. 286; *Locke v. Speed*, 62 Mich. 408; *La Barr v. Osborn*, 88 Mich. 313.

errors in his record,<sup>1</sup> or to issue an execution,<sup>2</sup> or to sign a bill of exceptions,<sup>3</sup> or grant an appeal,<sup>4</sup> or certify a cause.<sup>5</sup>

### 10. *To Legislative Officers.*

§ 977. Does not lie to control legislative Action.—The same principles apply to the case of legislative officers. The due performance of their duties as such is confided to their official judgment and discretion and, as in the case of other officers exercising like powers, the courts will not undertake to control such judgment and discretion by mandamus. It will not, therefore, lie against the speaker of the house of representatives to compel him to send to the senate a bill which he has held not to have passed the house.<sup>6</sup>

So in the case of lesser legislative bodies, as of the common council of a city, the writ will not be granted to compel the members of the council to attend the meetings of the council and perform their general official duties regularly.<sup>7</sup>

But the writ has been granted to compel the performance of a purely ministerial act, as to require the speaker to certify the amount of mileage to which a member is entitled.<sup>8</sup>

### 11. *To try Title to Office.*

§ 978. Does not lie to try Title.—As has previously been seen, mandamus will not lie to settle the title to an office as between adverse claimants, *quo warranto* being the proper remedy.<sup>9</sup> But—

§ 979. Lies to instate one whose Title is clear.—Where a person holds an uncontested title to the office or where his title has been adjudicated upon and finally established by a competent tribunal, mandamus may issue to put him in possession.<sup>10</sup>

<sup>1</sup> Taylor v. Gillette, 53 Conn. 216.

<sup>2</sup> State v. District Court, 49 N. J. L. 587.

<sup>3</sup> People v. Anthony, 25 Ill. App. 583.

<sup>4</sup> State v. Allen, 92 Mo. 20.

<sup>5</sup> Bennett v. McCaffery, 38 Mo. App. 220.

<sup>6</sup> *Ex parte* Echols, 39 Ala. 698, 85 Am. Dec. 749.

<sup>7</sup> People v. Whipple, 41 Mich. 548.

<sup>8</sup> *Ex parte* Pickett, 24 Ala. 91.

<sup>9</sup> See *ante*, § 478.

<sup>10</sup> Mannix v. State, 115 Ind. 245, 17 N. E. Rep. 535; McGee v. State, 103 Ind. 444.

§ 980. *Lies to restore Officer wrongfully removed.*—So mandamus lies to restore an officer to his office where, while having the actual possession and undisputed right to the same, he has been illegally ousted therefrom either by removal or suspension.<sup>1</sup>

§ 981. *Lies to restore Insignia of Office.*—And the officer may have this writ in such a case, for the restoration to him of the office-room with the books, records and insignia of the office.<sup>2</sup>

## 12. *To Compel Delivery of Books and Papers.*

§ 982. *Mandamus lies to compel Officer to deliver Books and Papers to his Successor.*—Mandamus is the proper remedy to compel an officer whose term of office has expired to deliver to his successor the books, papers, seals and other appurtenances and insignia of the office.<sup>3</sup>

<sup>1</sup> *Metaker v. Neally*, — Kans. —, 21 Pac. Rep. 206; *Ex parte Lusk*, 83 Ala. 519; *Ex parte Diggs*, 52 Ala. 331; *Ex parte Wiley*, 54 Ala. 226; *State v. Common Council*, 9 Wis. 254; *State v. Jersey City*, 25 N. J. L. 536; *In re Strong*, 20 Pick. (Mass.) 484; *Milliken v. City Council*, 54 Tex. 388; *Delahanty v. Warner*, 75 Ill. 185.

<sup>2</sup> *Metaker v. Neally*, — Kans. —, 21 Pac. Rep. 206; *State v. Sherwood*, 15 Minn. 231; *People v. Kilduff*, 15 Ill.

419; *People v. Head*, 25 Ill. 325; *Trustees v. Fogg*, 78 Ind. 209; *Nelson v. Edwards*, 55 Tex. 389; *Delahanty v. Warner*, 75 Ill. 185.

<sup>3</sup> *People v. Kilduff*, 15 Ill. 422, 60 Am. Dec. 769; *People v. Head*, 25 Ill. 329; *People v. Hilliard*, 29 Ill. 419; *Delahanty v. Warner*, 75 Ill. 186; *Huffman v. Mills*, 39 Kans. 577; *State v. Meeker*, 19 Neb. 444; *McGee v. State*, 103 Ind. 444.

## CHAPTER II.

### OF INJUNCTIONS AGAINST PUBLIC OFFICERS.

§ 983. Purpose of this Chapter.

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984. In general.

985. Does not lie where there is an adequate Remedy at Law.

#### II. AGAINST WHAT OFFICERS GRANTED.

986. Does not lie against the President.

987. Nor against executive Officers of Government.

988. Whether lies against Governor and other State Officers.

989. Does not lie against Judges.

#### III. IN WHAT CASES APPLICABLE.

990. Does not lie to prevent Officer from exercising his legal Authority.

§ 991. Does not lie to interfere with official Discretion.

992. Will not lie to restrain criminal Proceedings or Enforcement of Ordinances.

993. Does not lie to restrain Passage or Signing of Ordinances.

994. Does not lie to try Title to Office.

995. Writ granted to restrain illegal Action affecting private Rights.

996. Writ lies to prevent illegal Expenditure or Appropriation of public Funds.

997. Lies to prevent Violation of Duty.

998. Lies to prevent Removal of Office.

§ 983. Purpose of this Chapter.—In the preceding chapter there has been considered the remedy which the law provides for the purpose of compelling public officers to act, either generally or in a particular manner specifically pointed out. Occasion may arise, however, for producing the opposite result,—that of restraining action on the part of the officer, and for that purpose, the ordinary writ of injunction is the remedy which the law provides.

## I.

### OF THE NATURE OF THE REMEDY.

§ 984. In general.—The general nature of the remedy by injunction is so well understood and so fully and ably treated in

works devoted exclusively to that subject, that but little space need be given to it here.

The writ has been defined by Mr. High<sup>1</sup> as "a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or to refrain from doing a particular thing." When granted to direct the doing of an act, the writ is usually designated as a mandatory injunction; and it is called a preventive injunction when granted to require the defendant to refrain from doing.<sup>2</sup> It is in the latter case, that it is most frequently applied to public officers; its mandatory functions being generally superseded by the writ of mandamus.

§ 985. Does not lie where there is adequate Remedy at Law.—Like mandamus, injunction is an extraordinary remedy, and it is well settled that it will not be granted where the party applying for it has a full and adequate remedy at law.<sup>3</sup>

But, as in the case of mandamus also, to bar relief by injunction in an otherwise appropriate case, "it must appear," says Mr. High,<sup>4</sup> "that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity. And unless this is shown a court of equity may lend its extraordinary aid by injunction, notwithstanding the existence of a remedy at law. But by a plain and adequate remedy at law within the meaning of the rule is not meant the right to resort to every remedy given by the forms of legal procedure; and if any form of action at law will afford a complete and adequate remedy, the case falls within the principle which tests the right to resort to equity, and the court will refuse to interfere by injunction."

## II.

### AGAINST WHAT OFFICERS GRANTED.

§ 986. Does not lie against the President.—For reasons similar to those which, as has been seen,<sup>5</sup> influence the courts in

<sup>1</sup> High on Inj., § 1.

<sup>2</sup> High on Inj., § 2.

<sup>3</sup> Adams v. Harrington, 114 Ind. 66; Weber v. Timlin, 87 Minn. 374; Bloomington v. Blodgett, 24 Ill. App.

650; Fincke v. Police Commissioners,

6 How. (N. Y.) Pr. 318.

<sup>4</sup> High on Inj. § 30.

<sup>5</sup> See ante, § 954.

refusing to interfere by mandamus with the executive officers of government, it is held that the courts have no jurisdiction of a bill to enjoin the President of the United States in the performance of his official duties.<sup>1</sup>

Nor does it make any difference that the President be not described as such but merely as a citizen of one of the States.<sup>2</sup>

§ 987. **Nor against executive Officers of Government.**—Neither will the writ lie against the executive officers of the government, as the secretary of the interior or commissioner, register or receiver of the land offices, to restrain them from acting in matters resting in the judgment and discretion of those officers as representatives of the executive department of the government.<sup>3</sup>

§ 988. **Whether lies against Governor and other State Officers.**—As has been seen in a previous section,<sup>4</sup> the authorities are much in conflict as to the power of the courts to control the official acts of the governor and other State officers, and the same principles would apply to proceedings by injunction. It is, of course, clear that the courts will not undertake to interfere with the performance of that class of duties which belong strictly to the executive character and appeal to the official discretion and judgment of the officer.<sup>5</sup> But in the case of merely ministerial duties, the question is not so clear, and while there are authorities which deny the power to interfere in any case,<sup>6</sup> there are others which declare the performance of ministerial duties clearly imposed to be subject to the control of the judicial tribunals.<sup>7</sup>

<sup>1</sup> *State of Mississippi v. Johnson*, President, 4 Wall. (U. S.) 475.

<sup>2</sup> *State of Mississippi v. Johnson*, *supra*.

<sup>3</sup> *Gaines v. Thompson*, 7 Wall. (U. S.) 847; *Litchfield v. Register*, 9 Wall. (U. S.) 575.

<sup>4</sup> See *ante*, § 954.

<sup>5</sup> See *ante*, § 954.

Thus it will not lie against the comptroller-general to restrain him from issuing execution for the collection of the public revenues. *Scotfield v. Perkerson*, 46 Ga. 350; nor

against the auditor and treasurer to prevent them from enforcing a public law, *Gibbs v. Green*, 54 Miss. 592; nor against the commissioners of the canal fund to restrain them from making a loan. *Thompson v. Commissioners*, 2 Abb. (N. Y.) Pr. 248.

<sup>6</sup> Does not lie against State Treasurer to restrain his official action. *Secombe v. Kittelson*, 29 Minn. 555.

<sup>7</sup> *Martin v. Ingham*, 38 Kana. 641. See also *Flint, &c., Ry. Co. v. Auditor-General*, 41 Mich. 685.

§ 989. Does not lie against Judges.—Courts of equity may interfere by injunction to restrain parties from prosecuting actions at law, but an injunction will not be granted to restrain the judge of a court from exercising his judicial functions,<sup>1</sup> even though he is proceeding under an unconstitutional statute.<sup>2</sup>

### III.

#### IN WHAT CASES APPLICABLE.

§ 990. Does not lie to prevent Officer from exercising his legal Authority.—In determining the cases in which a public officer may be restrained by injunction, it may first be noticed that the writ will not be granted to restrain a public officer from acting where he is proceeding by the authority and in pursuance of the law regulating his powers and duties, unless such law be unconstitutional or otherwise invalid.<sup>3</sup> What a valid law authorizes the officer to do, the courts will not undertake to prevent, even though it be alleged that the officer is actuated by unworthy motives.

§ 991. Does not lie to interfere with official Discretion.—So it is well settled that where the law invests public officers with discretionary or *quasi*-judicial powers in reference to matters within their jurisdiction, courts of equity will not interfere by injunction to restrain, control or review the exercise of the powers so conferred; the proper remedy, if any exists, is by *certiorari*.<sup>4</sup> Illustrations of powers falling within this classification have already been given, and the refusal to interfere by injunction is in harmony with the rules which, as has been seen, govern attempts to hold such officers liable to private action,<sup>5</sup> or to control their performance by *mandamus*.<sup>6</sup>

§ 992. Will not lie to restrain criminal Proceedings or Enforcement of Ordinances.—It is also well settled that an injunc-

<sup>1</sup> Sanders v. Metcalf, 1 Tenn. Ch. 419.

<sup>2</sup> Jones v. Stallworth, 55 Tex. 188.

<sup>3</sup> Whitman v. Hubbell, 30 Abb. N. Cas. (N. Y.) 885; Delaware County's Appeal, — Penn. —, 18 Atl. Rep. 62;

People v. Supervisors, 75 Cal. 179; Sage v. Fifield, 68 Wis. 546.

<sup>4</sup> Mooers v. Smedley, 6 Johns. (N. Y.) Ch. 28.

<sup>5</sup> See *ante*, § 594.

<sup>6</sup> See *ante*, § 945.

tion will not be granted to restrain a criminal prosecution, or proceedings for the enforcement of municipal ordinances, upon the ground that the ordinance is illegal or that the party accused is innocent.<sup>1</sup> An appeal furnishes an adequate remedy in such a case.

But a court of equity has jurisdiction to enjoin the enforcement of a city ordinance having for its purpose the destruction of valuable property rights, acquired by franchise from the municipality, and in which the public has an interest and where the injury will be irreparable.<sup>2</sup>

§ 993. Does not lie to restrain Passage or Signing of Ordinances.—Neither will the writ be granted to restrain municipal officers, in the exercise of the legislative and administrative powers conferred upon them by law, from passing or adopting an ordinance.<sup>3</sup>

So it will not be granted to prevent the mayor from signing an ordinance duly passed.<sup>4</sup>

§ 994. Does not lie to try Title to Office.—It is well settled also, as has heretofore been seen,<sup>5</sup> that the writ can not be made, directly or indirectly, to take the place of *quo warranto* and other similar remedies, in trying the title to public office.<sup>6</sup> It will, therefore, not be granted to prevent one alleged to have no legal title from exercising the functions of an office during a trial to determine the title,<sup>7</sup> or from qualifying for,<sup>8</sup> or entering

<sup>1</sup> Poyer v. Village of Des Plaines, 128 Ill. 111, 5 Am. St. Rep. 494; Waters Pierce Oil Co. v. Little Rock, 89 Ark. 412; Sues v. Noble, 81 Fed. Rep. 855; Kansas City Ry. Co. v. Kansas City, 29 Mo. App. 89; West v. Mayor, 10 Paige (N. Y.) 589; Cohen v. Commissioners, 77 N. O. 2; Yates v. Batavia, 79 Ill. 500; Moses v. Mayor, 52 Ala. 198; Burnett v. Craig, 30 Ala. 185, 68 Am. Dec. 115; Hamilton v. Stewart, 59 Ill. 380; Davis v. American Society, 75 N. Y. 362.

<sup>2</sup> Port of Mobile v. Louisville, &c., R. R. Co., 84 Ala. 115, 5 Am. St. Rep. 343; City Council v. Louisville, &c., R. R. Co., 84 Ala. 127.

<sup>3</sup> Harrison v. New Orleans, 33 La. Ann. 222, 39 Am. Rep. 273.

<sup>4</sup> New Orleans Ry. Co. v. New Orleans, 39 La. Ann. 127.

<sup>5</sup> See ante, § 477.

<sup>6</sup> Kilpatrick v. Smith, 77 Va. 347; Beebe v. Robinson, 52 Ala. 66; Planters' Company v. Hanes, 53 Miss. 469; Patterson v. Hubbs, 65 N. O. 119; Dickey v. Reed, 78 Ill. 261; Moulton v. Reid, 54 Ala. 320.

<sup>7</sup> Foster v. Moore, 32 Kans. 433; McDonald v. Rehner, 23 Fla. 198; People v. Draper, 24 Barb. (N. Y.) 265; Hagner v. Heyberger, 7 W. & S. (Penn.) 104, 42 Am. Dec. 230; Updegraff v. Crans, 47 Penn. St. 103.

<sup>8</sup> Moulton v. Reid, 54 Ala. 320.



upon the exercise of the office,<sup>1</sup> or from receiving the salary or fees attached to it.<sup>2</sup>

Neither will the writ be granted to prevent the appointment of one to fill a vacancy alleged to have been created by the unlawful removal of the former occupant,<sup>3</sup> or to prevent the calling of an election which has been determined upon by those to whom the law has delegated the power and duty.<sup>4</sup>

But while the writ will not be granted to try the title to an office, it may be issued to protect the actual incumbents in their exercise of it by preventing others from interfering until the title can be determined by the proper proceedings.<sup>5</sup>

§ 995. **Writ will be granted to restrain illegal Action affecting private Rights.**—But, on the other hand, it is equally well settled that where public officers are proceeding, without authority of law or in violation of its provisions or by virtue of an unconstitutional enactment, to the performance of acts which will materially affect, impair, injure or destroy the private vested rights of individuals, and for which they have no adequate remedy at law, an injunction will be granted to restrain them.<sup>6</sup>

The jurisdiction in this respect is frequently invoked to prevent the unlawful appropriation of private property to public use, or its injury or destruction, as in opening, extending or altering highways,<sup>7</sup> constructing sidewalks,<sup>8</sup> removing fences,<sup>9</sup> destroying docks,<sup>10</sup> obstructing streets,<sup>11</sup> draining swamps,<sup>12</sup> creating nuisances,<sup>13</sup> and the like.

<sup>1</sup> Beebe v. Robinson, 52 Ala. 66.

<sup>2</sup> Colton v. Price, 50 Ala. 424; Tappan v. Gray, 9 Paige (N. Y.) 507; Stone v. Wetmore, 42 Ga. 601.

<sup>3</sup> Delahanty v. Warner, 75 Ill. 185.

<sup>4</sup> Harris v. Schryock, 82 Ill. 119; Jones v. Black, 48 Ala. 540.

<sup>5</sup> Brady v. Sweetland, 18 Kans. 41.

<sup>6</sup> Cooper v. Alden, Harr. (Mich.) 72; Brown v. Gardner, *Id.* 291; Ryan v. Brown, 18 Mich. 196; Owens v. Crossett, 105 Ill. 354; Morgan v. Miller, 59 Iowa 481; Wetherell v. Newington, 54 Conn. 67; Belknap v. Belknap, 2 Johns. Ch. (N. Y.) 463, 7 Am. Dec. 548.

<sup>7</sup> Morgan v. Miller, 59 Iowa 481; Wetherell v. Newington, 54 Conn. 67; Weiss v. Jackson County, 9 Ore. 470.

<sup>8</sup> Bryan v. East St. Louis, 12 Ill. App. 390.

<sup>9</sup> Owens v. Crossett, 105 Ill. 354.

<sup>10</sup> Ryan v. Brown, 18 Mich. 196.

<sup>11</sup> Cooper v. Alden, Harr. (Mich.) 72.

<sup>12</sup> Belknap v. Belknap, 2 Johns. (N. Y.) Ch. 463, 7 Am. Dec. 548.

<sup>13</sup> Upjohn v. Richland, 46 Mich. 542. See also Palmer v. Rich, 12 Mich. 414; Kinyon v. Duchene, 21 Mich. 498; Merrill v. Humphrey, 24 Mich. 170;

§ 996. Writ lies to prevent illegal Expenditures or Appropriations of public Funds.—So the writ will be granted to prevent public officers having the matter in charge from making illegal expenditures or appropriations of the public funds, or from levying an unjust or unlawful tax.<sup>1</sup>

What shall be the interest which will suffice to entitle a private person to invoke the application of the remedy is a question upon which the authorities are not in full accord. It is undoubtedly the right of the attorney-general or other law officer of the public to interfere to prevent the wrongful expenditure or appropriation of the public funds,<sup>2</sup> and it is held, in some States, that he alone is the proper party and not a private taxpayer, unless the tax-payer be one who has a special interest or suffers a special injury not shared in common by all of the other tax-payers of the community.<sup>3</sup> But by the great preponderance of authority, it is settled that any single tax-payer, or any number of them, may intervene to prevent by injunction an unlawful levy, appropriation or expenditure by which the burden of the tax-payer as such would be unjustly and illegally increased, and that a special or peculiar interest or injury is not indispensable.<sup>4</sup>

Clement v. Everest, 29 Mich. 19; Bristol v. Johnson, 84 Mich. 123; Marquette, &c., R. R. Co. v. Marquette, 85 Mich. 504; Flint, &c., R. R. Co. v. Auditor-General, 41 Mich. 685; Folkerts v. Power, 42 Mich. 283.

<sup>1</sup> McCord v. Pike, 121 Ill. 288, 2 Am. St. Rep. 85; The Liberty Bell, 28 Fed. Rep. 848; Hospers v. Wyatt, 63 Iowa 264; Grayville v. Gray, 19 Ill. App. 120; Davenport v. Kleinschmidt, 6 Mont. 503; New London v. Brainard, 23 Conn. 552; Rothrock v. Carr, 55 Ind. 384; Henderson v. Covington, 14 Bush (Ky.) 812.

<sup>2</sup> Cooley on Taxation, 2nd ed. 764; State v. County Court, 51 Mo. 350, 11 Am. Rep. 454. But see *contra*, State v. McLaughlin, 15 Kans. 228, 22 Am. Rep. 264.

<sup>3</sup> Kilbourne v. St. John, 59 N. Y. 21, 17 Am. Rep. 291; Wood v. Bangs, 1 Dak. 179; Louisiana National

Bank v. New Orleans, 27 La. Ann. 446; Merriam v. Supervisors, 72 Cal. 517.

In Michigan, see Miller v. Grandy, 18 Mich. 540; Steffes v. Moran, 68 Mich. 291, 12 West. Rep. 555; Curtenius v. Grand Rapids, &c., R. R. Co., 37 Mich. 583.

<sup>4</sup> Crampton v. Zabriskie, 101 U. S. 601; Hospers v. Wyatt, 63 Iowa 264; Davenport v. Kleinschmidt, 6 Mont. 503; Newmeyer v. Missouri, &c., R. R. Co. 52 Mo. 81, 14 Am. Rep. 394; McCord v. Pike, 121 Ill. 288, 2 Am. St. Rep. 85; Colton v. Hanchett, 18 Ill. 615; Prettyman v. Supervisors, 19 Ill. 406, 71 Am. Dec. 230; Perry v. Kinnear, 43 Ill. 160; Drake v. Phillips, 40 Ill. 889; Chestnutwood v. Hood, 68 Ill. 132; Devine v. Commissioners, 84 Ill. 590; City of Springfield v. Edwards, 84 Ill. 626; Leitch v. Wentworth, 71 Ill. 147;

§ 997. *Lies to prevent Violation of Duty.*—So it is said to be “well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other.”<sup>1</sup>

§ 998. *Lies to prevent Removal of Office.*—The writ will therefore, lie to prevent county officers from removing their offices from the county seat, pending the determination of a suit to settle its location.<sup>2</sup> But the court will not interfere after the question of the removal has been determined by the appropriate tribunal.<sup>3</sup>

Mayor of Baltimore v. Gill, 81 Md. 875; Willard v. Comstock, 58 Wis. 565; Place v. Providence, 12 R. I. 1; Sinclair v. Commissioners, 28 Minn. 407; Smith v. Magourich, 44 Ga. 163; Wheeler v. Philadelphia, 77 Penn. St. 388; City of Valparaiso v. Gardner, 97 Ind. 1; Merrill v. Plainfield, 45 N. H.

126; London v. Wilmington, 78 N. C. 109; Winston v. Tennessee, &c., R. Co., 1 Baxt. (Tenn.) 60.

<sup>1</sup> Board of Liquidation v. McComb, 92 U. S. 531, 541.

<sup>2</sup> Shaw v. Hill, 67 Ill. 455.

<sup>3</sup> Sanders v. Metcalf, 1 Tenn. Ch. 419; Ellis v. Karl, 7 Neb. 381.

## CHAPTER III.

## OF CERTIORARI TO PUBLIC OFFICERS.

§ 999. Purpose of this Chapter.

## I. OF THE NATURE OF THE REMEDY.

1000. Definition of the Writ.

1001. Lies only to review judicial Action.

1002. Is not a Writ of Right

1003. Does not lie where other Remedy exists.

1004. Not granted where Party has been guilty of Laches.

1005. Does not lie to review Discretion.

1006. Party applying for Writ should have special Interest.

## II. TO WHAT OFFICERS WRIT IS ISSUED.

§ 1007. Issued only to judicial and not to ministerial, executive or legislative Officers.

1008. Illustrations of Application of the Writ.

## III. WHAT QUESTIONS ARE OPEN TO REVIEW.

1009. Presumption that Proceedings are regular.

1010. How when Writ addressed to inferior Courts or Tribunals.

1011. How where Writ addressed to *Quasi-judicial* Officer.

§ 999. Purpose of this Chapter.—The writ of *certiorari* is most frequently used in its office as a branch of the regular machinery of the courts, and as such its consideration belongs rather to a work upon practice than to this. Some general consideration of the writ, however, as one applicable to a large class of officers who do not sit as judges in courts, is deemed germane to the scope of this work and will therefore be given.

## I.

## OF THE NATURE OF THE REMEDY.

§ 1000. Definition of the Writ.—*Certiorari* is a writ issuing from a superior court to an inferior court, tribunal or officer exercising judicial power whose proceedings are summary or not according to the course of the common law, commanding that the records of a cause or matter depending before such court, tribu-

nal or officer be certified to the superior court from which the writ was issued.<sup>1</sup>

§ 1001. *Lies only to review judicial Action.*—The writ of *certiorari* lies to correct errors or restrain excesses of jurisdiction of inferior courts and officers acting judicially only.<sup>2</sup> It will, therefore, not be issued to officers whose functions and duties are ministerial, executive or legislative and not judicial.<sup>3</sup>

§ 1002. *Is not a Writ of Right.*—The writ of *certiorari* is not one strictly of right, but rests in the sound and legal but not capricious discretion of the court,<sup>4</sup> to be allowed or not as may best promote the ends of justice. Statutory provisions respecting its exercise do not alter this rule.<sup>5</sup>

<sup>1</sup> "The writ of *certiorari* is a writ issuing sometimes out of chancery, and sometimes out of the king's bench or common pleas; and lieth where the king would be certified of any record which is in the treasury, or in the common pleas, or in any other court of record; or before the sheriff and coroner; or of a record before the commissioners, or before the escheator; in which cases he may send this writ to any of the said courts or officers, to certify such record before him *in banco* or in chancery, or before other justices, where the king pleaseth to have the same certified; and he or they to whom the *certiorari* is directed, ought to send the same record, or the tenor of it, as commanded by the writ; and if they fail so to do, then an *alias* shall be awarded, and afterwards a *pluries*, with a clause of *vel causum nobis signifies*, and after that an attachment, if good cause be not returned upon the *pluries*." TIDDS, Pr. 897. See also Farmington River Water Power Co. v. County Commissioners, 112 Mass. 206; Lynch v. Crosby, 184 Mass. 818.

<sup>2</sup> Locke v. Selectmen, 122 Mass. 290; Queen v. Hatfield Peverel, 14 Q. B.

298; Queen v. Salford, 18 Q. B. 687; Parks v. Mayor, 8 Pick. (Mass.) 218.

<sup>3</sup> Attorney-General v. Northampton, 148 Mass. 589; *In re* Willson, 83 Minn. 145; People v. Common Council, 38 Hun (N. Y.) 7; State v. St. Paul, 34 Minn. 250; Stone v. Mayor, 25 Wend. (N. Y.) 157; People v. Mayor, 2 Hill (N. Y.) 9; People v. Supervisors, 1 *Id.* 195; People v. Walter, 68 N. Y. 403; Robinson v. Supervisors, 16 Cal. 208; Thompson v. Multnomah County, 3 Oreg. 34; Locke v. Selectmen, 122 Mass. 290; Supervisors v. Auditor-General, 37 Mich. 165; State v. St. Paul, 34 Minn. 250; Esmeralda County v. District Court, 18 Nev. 438; *In re* Saline County, 45 Mo. 52, 100 Am. Dec. 337.

<sup>4</sup> Supervisors v. Magoon, 109 Ill. 142; *Ex parte* Pearce, 44 Ark. 509; Duggen v. McGruder, Walk. (Miss.) 112, 12 Am. Dec. 527; Welch v. County Court, 29 W. Va. 63, 1 S. E. Rep. 337; Knapp v. Heller, 32 Wis. 467; Walbridge v. Walbridge, 46 Vt. 617; People v. Andrews, 53 N. Y. 445; Roediger v. Commissioner, 40 Mich. 745; Gager v. Supervisors, 47 Mich. 167.

<sup>5</sup> *In re* Lantis, 9 Mich. 324, 80 Am. Dec. 58.

§ 1003. Does not lie where other Remedy exists.—So it is well settled that the writ will not be issued where the law gives by appeal, exceptions or writ of error another remedy for the correction of the errors complained of.<sup>1</sup> The fact that through the ignorance or neglect of the party or his attorney the time for availing himself of such other remedy has expired, will not ordinarily suspend the operation of this rule;<sup>2</sup> but where the right to pursue the other remedy has been lost by the neglect, fraud or collusion of others for whom the party applying for the writ is not responsible, the writ has, in some cases, been allowed.<sup>3</sup> It has also been allowed in other cases where special circumstances exist showing that a failure of justice would result if the writ were denied.<sup>4</sup>

§ 1004. Not granted where Party has been guilty of Laches.—And it is a general rule that the party applying for the writ must have acted promptly,<sup>5</sup> and the court will not interfere where the application has been delayed until new rights or interests have intervened.<sup>6</sup> The reasons for refusing the writ are greater where important public works are involved, and the application has not been made as soon as practicable.<sup>7</sup>

Even though the writ has been granted in the first instance, it will be dismissed upon the hearing where the party has been

<sup>1</sup> State v. Lowery, 49 N. J. L. 391; Alabama, &c., R. R. Co. v. Christian, 82 Ala. 307; Beasley v. Beckley, 28 W. Va. 81; Ransom v. Cummins, 66 Iowa 187; Wilson v. Burks, 71 Ga. 863; State v. County Court, 80 Mo. 500; Galloway v. Corbitt, 52 Mich. 460; Pettigrew v. Washington County, 43 Ark. 33; Stuttmelster v. Superior Court, 71 Cal. 323; Farrell v. Taylor, 12 Mich. 113; Specht v. Detroit, 20 Mich. 163; Smith v. Reed, 24 Mich. 240; Ishpeming v. Maroney, 49 Mich. 226; Tucker v. Drain Commissioners, 50 Mich. 5.

But see in Texas, Ray v. Parsons, 14 Tex. 370, and in New Jersey, New Jersey R. R. v. Suydam, 2 Harr. 25;

Krumeick v. Krumeick, 2 Green 39.

<sup>2</sup> Turner v. Powell, 93 N. C. 341; Stocking v. Knight, 19 Ill. App. 501; Smith v. Abrams, 90 N. C. 21; Norman v. Snow, 94 N. C. 431.

<sup>3</sup> See Perkins v. Hadley, 4 Hayw. (Tenn.) 143; Copeland v. Cox, 5 Heisk. (Tenn.) 172; King v. Williams, 7 Id. 303; Skinner v. Maxwell, 67 N. C. 257.

<sup>4</sup> Specht v. Detroit, 20 Mich. 163.

<sup>5</sup> In re Lantis, 9 Mich. 324; Rents v. Detroit, 48 Mich. 544; Carpenter v. Commissioner, 64 Mich. 476.

<sup>6</sup> Wilson v. Gifford, 42 Mich. 456.

<sup>7</sup> Dunlap v. Toledo, &c., R. R. Co., 46 Mich. 190; Bresler v. Ellis, 46 Mich. 335; Rentz v. Detroit, 48 Mich. 544.

guilty of laches in applying it,<sup>1</sup> or the writ has been improvidently granted.<sup>2</sup>

§ 1005. **Does not lie to review Discretion.**—Neither will the writ be issued to review matters which rested in the discretion of the court or officer below.<sup>3</sup> The fact that a public agent exercises judgment or discretion in the performance of his duty does not make his action or his functions judicial.<sup>4</sup>

§ 1006. **Party applying for Writ should have special Interest.**—The writ will not be issued where it does not appear that the person applying for it has a special and substantial interest in the subject-matter and will suffer actual and substantial wrong or injury if the relief should be denied.<sup>5</sup> The court will not interfere where the right of the party is speculative or doubtful, nor unless substantial and material relief can be afforded by its intervention. There must be “something material to be accomplished,—something on which the judgment of the court can act effectively and work advantage to the plaintiff.”<sup>6</sup>

## II.

### TO WHAT OFFICERS WRIT IS ISSUED.

§ 1007. **Issued only to judicial and not to ministerial, executive or legislative Officers.**—As has been seen, *certiorari* lies only to review judicial action.<sup>7</sup> It will be issued, therefore, only to officers exercising judicial functions,<sup>8</sup> and not to those whose

<sup>1</sup> Trustees v. Directors, 88 Ill. 100; Kimple v. San Francisco, 66 Cal. 186; State v. Milwaukee County, 58 Wis. 4; People v. Commissioners, 77 N. Y. 605.

<sup>2</sup> Vanderstolph v. Boylan, 50 Mich. 330; Whitbeck v. Hudson, 50 Mich. 86.

<sup>3</sup> Ketchum v. Superior Court, 65 Cal. 494; Supervisors v. Auditor-General, 27 Mich. 165; Hildreth v. Crawford, 65 Iowa 339; Benton v. Taylor, 46 Ala. 388; Livingston v. Rector, 45 N. J. L. 230.

<sup>4</sup> People v. Commissioners, 97 N.

Y. 37; People v. Walter, 68 N. Y. 403.

<sup>5</sup> State v. Lamberton, 37 Minn. 363; People v. Leavitt, 41 Mich. 470; Davison v. Otis, 24 Mich. 23.

<sup>6</sup> GRAVES, J., in People v. Leavitt, *supra*; People v. Phillips, 67 N. Y. 582; People v. Walter, 68 N. Y. 403.

<sup>7</sup> See *ante* § 1001.

<sup>8</sup> See Miller v. Trustees, 88 Ill. 26; Moreland v. Whitford, 54 Wis. 150; People v. Judge, 32 Mich. 95; Hitchcock v. Sutton, 28 Mich. 96; McGregor v. Supervisors, 37 Mich. 338; Clay v. Creek, 34 Mich. 204; Names

functions, powers and duties are ministerial, executive or legislative in their nature.<sup>1</sup>

§ 1008. **Illustrations of the Application of the Writ.**—Illustrations of the application of the writ to inferior courts and tribunals are sufficiently afforded by any of the works of practice, but in the case of those officers not sitting as judges in courts, some illustrations may be of use.

I. Thus the writ lies to review the proceeding of commissioners, supervisors and overseers in the opening of ditches and drains,<sup>2</sup> the establishing, laying out and altering of highways,<sup>3</sup> or the condemning of lands for public use;<sup>4</sup> to review the action of a board of supervisors,<sup>5</sup> or of a township board,<sup>6</sup> in deciding upon the removal of an officer; of trustees of schools in deciding upon the uniting of school districts;<sup>7</sup> of a superintendent of public instruction in dividing school districts;<sup>8</sup> of assessors of taxes in valuing and assessing property;<sup>9</sup> of supervisors in acting as a board of equalization;<sup>10</sup> of commissioners and special tribunals in passing upon contested elections;<sup>11</sup> of a police board in imposing a fine for absence from duty;<sup>12</sup> of commissioners in portioning

*v. Commissioners*, 30 Mich. 490; *Townsend v. Howe*, 41 Mich. 263; *Merrick v. Town Board*, 41 Mich. 630; *Mayor v. Shaw*, 16 Ga. 172.

<sup>1</sup> *Attorney-General v. Northampton*, 143 Mass. 589; *In re Wilson*, 32 Minn. 145; *State v. St. Paul*, 34 Minn. 250; *People v. Common Council*, 38 Hun (N. Y.) 7; *People v. Park Commissioners*, 97 N. Y. 87; *Williams v. Supervisors*, 65 Cal. 160.

<sup>2</sup> *People v. Burnap*, 88 Mich. 850. But see *Tucker v. Commissioners*, 50 Mich. 5; *Dietz v. Commissioners*, 50 Mich. 227.

<sup>3</sup> *French v. Barre*, 58 Vt. 567; *Tewksbury v. Commissioners*, 117 Mass. 568; *Dorchester v. Wentworth*, 31 N. H. 451; *Ex parte Keenan*, 21 Ala. 558; *Names v. Commissioners*, 30 Mich. 490; *People v. Brighton*, 20 Mich. 57; *Keys v. Marin County*, 42 Cal. 252.

<sup>4</sup> *St. Charles v. Rogers*, 49 Mo. 530;

*Dunlap v. Toledo, &c., R. R. Co.*, 46 Mich. 190.

<sup>5</sup> *McGregor v. Supervisors*, 37 Mich. 388.

<sup>6</sup> *Merrick v. Township Board*, 41 Mich. 630.

<sup>7</sup> *Miller v. Supervisors*, 88 Ill. 26.

<sup>8</sup> *State v. Whitford*, 54 Wis. 150.

<sup>9</sup> *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444, 9 Am. Rep. 591; *Carroll v. Mayor*, 12 Ala. 173; *People v. Assessors*, 89 N. Y. 81; *People v. Assessors of Albany*, 40 N. Y. 154.

But see *contra*, *Whitbeck v. Hudson*, 50 Mich. 86; *Hudson v. Whitney*, 53 Mich. 158.

<sup>10</sup> *Royce v. Jenney*, 50 Iowa 676.

<sup>11</sup> *Chenoweth v. Commissioners*, 26 W. Va. 230; *Election Cases*, 65 Penn. St. 80; *Whitney v. Delegates*, 14 Cal. 479.

<sup>12</sup> *People v. Police Board*, 89 N. Y. 506.



lands;<sup>1</sup> of township trustees in calling election to vote on a tax in aid of railroads.<sup>2</sup>

II. But, on the other hand, where the action is not judicial, the writ will not lie, as of a board of county commissioners in forming a new school district,<sup>3</sup> or organizing a new township;<sup>4</sup> or of a board of supervisors in creating a swamp land district;<sup>5</sup> or of a board of park commissioners in consenting to and contracting for a bridge;<sup>6</sup> or of a municipal board in appointing a policeman,<sup>7</sup> the act in these cases being legislative in its nature. So the action of the auditor-general of the State in charging back to a county certain taxes in his settlement with the county, is the exercise of an official discretion belonging to an executive department of the State government, and can not be reviewed upon *certiorari*.<sup>8</sup>

### III.

#### WHAT QUESTIONS ARE OPEN TO REVIEW.

§ 1009. Presumption is that Proceedings are regular.—The well known presumption of the law that public officers have acted within their jurisdiction and have pursued and observed the limits set by law to their authority, applies here as elsewhere, and the party applying for the writ must be prepared to show wherein the alleged defects or irregularities exist.<sup>9</sup>

§ 1010. How when Writ addressed to inferior Courts and Tribunals.—The writ of *certiorari* lies to review questions of law only,<sup>10</sup> and where the writ is issued to bring up the record of

<sup>1</sup> Dyer v. Lowell, 80 Me. 217.

<sup>2</sup> Jordan v. Hayne, 86 Iowa 9.

<sup>3</sup> Lemont v. County Commissioners, 39 Minn. 385, 40 N. W. Rep. 859; *In re* Wilson, 83 Minn. 145. "Unless we are prepared," says the court in the first case, "to assume a general supervision over all municipal corporations, boards, commissions and public officers in the State, this writ must be confined to its legitimate office, which is to review proceedings judicial in their nature which affect the citizen

in his rights of person or property."

<sup>4</sup> Christlieb v. County Commissioners, — Minn. —, 42 N. W. Rep. 930.

<sup>5</sup> Williams v. Supervisors, 65 Cal. 160.

<sup>6</sup> People v. Park Commissioners, 97 N. Y. 87.

<sup>7</sup> Attorney-General v. Northampton, 143 Mass. 589.

<sup>8</sup> Supervisors v. Auditor-General, 27 Mich. 165.

<sup>9</sup> State v. County Clerk, 59 Wis. 15.

<sup>10</sup> Hyde v. Nelson, 11 Mich. 338;

an inferior court or tribunal, the court will only inquire into the question of the jurisdiction of the inferior tribunal,<sup>1</sup> and will not review questions of fact or examine the evidence except to determine whether there is an entire absence of proof upon some material fact.<sup>2</sup> In the latter event, a finding of fact becomes erroneous as matter of law.<sup>3</sup>

§ 1011. How when Writ addressed to quasi-judicial Officer.

—But when the writ is issued to an officer having only *quasi-judicial* powers, the scope of the remedy is enlarged, and the court will enquire not alone whether the officer had jurisdiction, but also whether he has kept within it, and has acted strictly according to law. To this end, errors and irregularities may be corrected, and the court will examine the evidence, to determine whether there was any competent evidence to justify the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated.<sup>4</sup>

State v. Whitford, 54 Wis. 150; Farmington, &c. Co. v. County Commissioners, 112 Mass. 206; State v. Hudson, 83 N. J. L. 365; Lapan v. County Commissioners, 65 Me. 160; Starr v. Trustees, 6 Wend. (N. Y.) 564; Chicago, &c. R. R. Co. v. Whipple, 23 Ill. 105; De Rocherbrune v. Southelmer, 12 Minn. 78.

<sup>1</sup> State v. Whitford, 54 Wis. 150; Hamilton v. Harwood, 118 Ill. 154; Locke v. Selectmen, 123 Mass. 290; Farmington, &c. Co. v. County Commissioners, 112 Mass. 206; Phillips v. Welch, 12 Nev. 158; Chittenden v. State, 41 Wis. 285; Baxter v. Brooks, 29 Ark. 173; Andrews v. Pratt, 44 Cal. 309; Monreal v. Bush, 46 Cal. 79; Frankfort v. County Commissioners, 40 Me. 389; Doolittle v. Galena R. R. Co. 14 Ill. 381.

<sup>2</sup> Jackson v. People, 9 Mich. 111; Hyde v. Nelson, 11 Mich. 353; Linn v. Roberts, 15 Mich. 443; Lynch v. People, 16 Mich. 473; Brown v. Blanchard, 39 Mich. 790; Genesee Savings Bank v. Michigan Barge Co., 52 Mich. 164.

<sup>3</sup> Hyde v. Nelson, 11 Mich. 353; Ciccotte v. Morse, 8 Mich. 424; Jackson v. People, 9 Mich. 111; Berry v. Lowe, 10 Mich. 9.

<sup>4</sup> Milwaukee Iron Co. v. Schubel, 29 Wis. 444, 9 Am. Rep. 591; State v. Whitford, 54 Wis. 150; People v. Police Board, 69 N. Y. 411; People v. Betts, 55 N. Y. 600; People v. Assessors, 40 N. Y. 154; St. Paul v. Marvin, 16 Minn. 104; Scrafford v. Supervisors, 41 Mich. 647.

## CHAPTER IV.

## OF THE WRIT OF PROHIBITION.

§ 1012. Purpose of this Chapter.

1012. Definition of Writ.

1014. Lies only to prevent Excess of Jurisdiction.

1015. I not a Writ of Right.

1016. Writ not granted when other Remedy exists.

§ 1017. Not issued when Act already done.

1018. Party must have objected to Jurisdiction.

1019. Lies only to restrain judicial Action.

1020. Does not lie to restrain executive or ministerial Action.

§ 1012. Purpose of this Chapter.—Like the writ of *certiorari* the writ of prohibition is so largely used as one of the means by which the supervisory control of the superior courts over the inferior is exercised, that its consideration belongs properly to a treatise upon the practice of the courts. Yet, like that writ also, it seems that some consideration of it properly belongs to such a treatise as this.

§ 1013. Definition of Writ.—The writ of prohibition is an extraordinary judicial writ, issuing from a court of superior jurisdiction, to prohibit the exercise, by an inferior tribunal or officer, of judicial powers with which he is not legally vested.<sup>1</sup> As stated in one case, its purpose is "to prevent the exercise, by a tribunal possessing judicial powers, of jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance."<sup>2</sup>

<sup>1</sup> For other definitions see Blackstone's Com. 112; High on Ex. Leg. Rem. § 762; Hudson v. Judge of Superior Court, 42 Mich. 289; Smith v. Whitney, 116 U. S. 167.

<sup>2</sup> ALLEN, J. in Thomson v. Tracy, 60 N. Y. 81.

"The writ of prohibition," says

MARSTON, J., in Hudson v. Judge, 42 Mich. 289, at p. 248, "is a remedy provided by the common law to prevent the encroachment of jurisdiction. It is a proper remedy in cases where the court exceeds the bounds of its jurisdiction, or takes cognizance of matters not arising within its juris-

§ 1014. **Lies only to prevent Excess of Jurisdiction.**—The writ lies only to prevent actions in excess of the jurisdiction conferred by law, and not to regulate or control the manner in which a lawful jurisdiction shall be exercised.<sup>1</sup> A mistaken or erroneous exercise of powers conferred by law must be remedied in some other way. The writ, therefore, will not lie to prevent an inferior court or tribunal from deciding erroneously in a matter within its jurisdiction, nor to prevent the enforcement of such an erroneous judgment.<sup>2</sup>

§ 1015. **Is not a Writ of Right.**—Like the other extraordinary writs which have already been considered, prohibition is not, where the party has any other remedy, a writ of strict right, but the question of its exercise is one resting in the sound, legal discretion of the court, and it will be granted or not according to the circumstances of each particular case.<sup>3</sup>

Where, however, the court or officer has clearly no jurisdiction of the proceeding and the party has objected to the jurisdiction at the outset and has no other remedy, it is said that he is entitled to the writ as a matter of right, and that a refusal to

diction. It can only be interposed in a clear case of excess of jurisdiction, and may lie to a part and not to the whole. It simply goes to the excess of jurisdiction, and the application for the writ may be made by either the plaintiff or the defendant in the case, or if more than one, by either where the excess of jurisdiction affects him. It can only be resorted to where other remedies are ineffectual to meet the exigencies of the case. It is a preventive rather than a remedial process, and can not, therefore, take the place of a writ of error or other mode of review. It must also appear that the person applying for the writ has made application in vain for relief to the court against which the writ is asked. The writ is not granted as a matter of strict right, but rests in a sound judicial discretion, to be granted or not, according

to the peculiar circumstances of each particular case when presented: 8 Bac. Abr. tit. Prohibition; 8 Bl. Com. 111; *Appo v. People*, 20 N. Y. 581; *People v. Seward*, 7 Wend. (N. Y.) 518; *Arnold v. Shields*, 5 Dana (Ky.) 21; *Washburn v. Phillips*, 2 Metc. (Mass.) 299; *Ex parte* Hamilton, 51 Ala. 62; *Blackburn*, *Ex parte*, 5 Pike (Ark.) 23; High Extr. Rem. §§ 778, 765."

<sup>1</sup> *Ex parte* Green, 29 Ala. 52; *Ex parte* Peterson, 33 Ala. 74; *Murphy v. Superior Court*, 58 Cal. 520; *Buskirk v. Judge*, 7 W. Va. 91; *Jacks v. Adair*, 33 Ark. 161.

<sup>2</sup> *Bank Lick Turnpike Co. v. Phelps*, 81 Ky. 618; *More v. Superior Court*, 64 Cal. 345.

<sup>3</sup> *Hudson v. Judge Superior Court*, 42 Mich. 239; *State v. Monroe*, 33 La. Ann. 923; *State v. Judge*, 4 Rob. (La.) 48.

grant it, where all the proceedings appear of record, may be reviewed on error.<sup>1</sup>

§ 1016. Writ not granted where other Remedy exists.—So, as in the case of other extraordinary remedies, this writ will not be granted where the party applying for it has another adequate remedy at law.<sup>2</sup> Thus the writ will not be issued where the law provides a complete remedy by appeal, nor can the writ be made to serve the purpose of a writ of error or *certiorari*.<sup>3</sup>

Neither will it be issued to usurp the province of an information in *quo warranto*, as to prevent the usurpation of an office.<sup>4</sup>

§ 1017. Not issued when Act already done.—Prohibition is a preventive rather than a remedial process, and will not, therefore, be issued where it would be ineffectual to prevent the act, as where the act complained of has already been done.<sup>5</sup>

§ 1018. Party must have objected to Jurisdiction.—The court will not interfere by prohibition, unless the party applying for the writ has previously interposed the proper plea or objection to the jurisdiction attempted to be exercised, and has failed to arrest its progress.<sup>6</sup>

§ 1019. Lies only to restrain judicial Action.—It is well settled that the writ lies only to prevent the unauthorized exercise by courts and officers of *judicial* powers, whether the respondent is sitting as a judge in regularly established courts or not.<sup>7</sup>

<sup>1</sup> GRAY, J., in *Smith v. Whitney*, 116 U. S. 167, 173.

<sup>2</sup> *Ex parte Braudlacht*, 2 Hill (N. Y.) 367, 38 Am. Dec. 593; *Hudson v. Judge*, 42 Mich. 239; *Ex parte Hamilton*, 51 Ala. 62; *People v. Wayne Circuit Court*, 11 Mich. 393, 38 Am. Dec. 754; *State v. Braun*, 81 Wis. 600; *Sherlock v. Jacksonville*, 17 Fla. 98.

<sup>3</sup> *Shell v. Cousins*, 77 Va. 323; *State v. Monroe*, 33 La. Ann. 923; *Ex parte Reid*, 50 Ala. 439; *Wreden v. Superior Court*, 55 Cal. 504; *People v. Nichols*, 79 N. Y. 533; *State v. Municipal Court*, 26 Minn. 162; *Smith v. Whitney*, 116 U. S. 167.

<sup>4</sup> *Buckner v. Veuve*, 63 Cal. 304.

<sup>5</sup> *Haldeman v. Davis*, 28 W. Va. 324; *State v. Stackhouse*, 14 S. C. 417; *Hudson v. Judge*, 42 Mich. 239, 248; *United States v. Hoffman*, 4 Wall. (U. S.) 158.

<sup>6</sup> *State v. Williams*, 48 Ark. 237; *State v. Steele*, 33 La. Ann. 569; *Hudson v. Judge*, 42 Mich. 239.

<sup>7</sup> *Ex parte Braudlacht*, 2 Hill (N. Y.) 367, 38 Am. Dec. 593; *Hobart v. Tillson*, 66 Cal. 210; *LaCroix v. Fairfield County Commissioners*, 50 Conn. 321; *People v. Lake County District Court*, 6 Colo. 534; *Spring Valley Water Works v. Bartlett*, 63

§ 1020. Does not lie to restrain executive or ministerial Action.—Hence the writ will not be granted to restrain the secretary of the interior from convening a court-martial<sup>1</sup> or the governor from issuing a commission;<sup>2</sup> nor to restrain the mayor<sup>3</sup> or common council<sup>4</sup> of a city from proceeding to investigate charges against a municipal officer; nor to restrain a tax collector from collecting a tax;<sup>5</sup> nor to interfere with a board of supervisors in fixing water rates;<sup>6</sup> nor to restrain county commissioners<sup>7</sup> or a city council<sup>8</sup> from granting licenses for the sale of liquor; nor to prevent a board of commissioners from calling an election;<sup>9</sup> nor to restrain a fence officer from deciding whether a fence should be built or not.<sup>10</sup>

Cal. 245; *Le Conte v. Berkeley*, 57 Cal. 269; *People v. San Francisco Election Commissioners*, 54 Cal. 404; *People v. Supervisors*, 1 Hill (N. Y.) 195; *Clayton v. Heidelberg*, 17 Miss. 623; *State v. Gray*, 33 Wis. 98; *State v. Justices*, 41 Mo. 44; *Low v. Mining Co.*, 2 Nev. 75; *Chandler v. Mass. R. R. Commissioners*, 141 Mass. 206; *Smith v. Whitney*, 116 U. S. 167.

But *contra*, see *State v. Commissioners*, 1 Mill (S. C.) 55, 12 Am. Dec. 596; *Harrington v. Commissioners*, 2 McCord (S. C.) 400; *Lynah v. Commissioners*, Harper (S. C.) 386; *Price v. Commissioners*, 3 Hill (S. C.) 814.

<sup>1</sup> *Smith v. Whitney*, 116 U. S. 167.

<sup>2</sup> *Grier v. Taylor*, 4 McCord (S. C.)

206.

<sup>3</sup> *Burch v. Hardwicke*, 28 Gratt. (Va.) 51.

<sup>4</sup> *People v. Lake City District Court*, 6 Colo. 534.

<sup>5</sup> *Hobart v. Tillson*, 66 Cal. 210; *Le Conte v. Berkeley*, 57 Cal. 269; *People v. Supervisors*, 1 Hill (N. Y.) 195; *Clayton v. Heidelberg*, 17 Miss. 623.

But *contra*, *People v. Works*, 7 Wend. (N. Y.) 486; *Burger v. State*, 1 McMull. (S. C.) 410.

<sup>6</sup> *Spring Valley Water works v. Bartlett*, 63 Cal. 245.

<sup>7</sup> *La Croix v. Fairfield County Commissioners*, 50 Conn. 821.

<sup>8</sup> *State v. Columbia*, 16 S. C. 412.

<sup>9</sup> *People v. San Francisco Election Commissioners*, 54 Cal. 404.

<sup>10</sup> *Seymour v. Almond*, 75 Ga. 112.

## CHAPTER V.

## OF CRIMINAL PROCEEDINGS AGAINST PUBLIC OFFICERS.

- § 1021. Purpose of this Chapter.  
 1022. Disregard of Duty punishable as a Crime.  
 1023. What Officers not indictable.

- § 1024. Officer *de Facto* liable.  
 1025. Liability for particular Offenses.

§ 1021. *Purpose of this Chapter.*—It is not within the scope of this work to enter at large into a discussion of the various criminal proceedings to which public officers may be liable. Too much depends, in this respect, upon local statutes, as well as the general principles of the criminal law, to make it possible to give adequate consideration to this subject within the limits of a single chapter. For this subject, therefore, the reader must be referred to the writers upon the criminal law, and to no one, with more satisfaction, than to Mr. Bishop.

But, in general—

§ 1022. *Disregard of Duty punishable as a Crime.*—"Any act or omission," says Mr. Bishop,<sup>1</sup> "in disobedience of official duty, by one who has accepted public office, is, when of public concern, in general, punishable as a crime." This is particularly so where the thing required is of a ministerial or other like nature, and there is reposed in the officer no discretion.<sup>2</sup>

<sup>1</sup>Bishop on Crim. Law, § 459.

<sup>2</sup>Citing *State v. McEntyre*, 8 Ire. (N. C.) 171, 174; *Reg. v. Neale*, 9 Car. & P. 431; *Respublica v. Montgomery*, 1 Yeates (Penn.) 419; *Reg. v. James*, 1 Eng. L. & Eq. 552; *Rex v. Howard*, 7 Mod. 307; *Rex v. Angell*, Oas. temp. Hardw. 124; *Anonymous*, 6 Mod. 96; *Crouther's Case*, Cro. Eliz. 654; *Smith v. Langham*, Skin. 60; *W's Case*, Loft. 44; *Adams v. Tertenants*, Holt 179; *State v.*

*Leigh*, 8 Dev. & Bat. (N. C.) 127; *Rex v. Commings*, 5 Mod. 179; *Rex v. Hemmings*, 8 Salk. 187; *Smith's Case*, Syme 185; *Wilkes v. Dinsman*, 7 How. (U. S.) 89; *Rex v. Harrison*, 1 East P. C. 382; *Reg. v. Buck*, 6 Mod. 306; *Mann v. Owen*, 9 B. & C. 595; *Rex v. Bootie*, 2 Bur. 864; *Rex v. Fell*, 1 Salk. 272; *Reg. v. Tracy*, 6 Mod. 30; *State v. Buxton*, 2 Swan (Tenn.) 57.

<sup>3</sup>Citing *Rex v. Osborn*, 1 Comyns

But this doctrine has its exceptions and qualifications; thus one serving in a judicial or other capacity in which he is required to exercise a judgment of his own, is not punishable for a mere error therein, or for a mistake of the law. His act, to be cognizable criminally, or even civilly, must be wilful and corrupt.<sup>1</sup> And if it is strictly judicial, and he is, for instance, a justice of the peace, and has jurisdiction, he will not be liable to the suit of the party, however the law may be as to a criminal prosecution, though corruption is alleged."<sup>2</sup>

§ 1023. **What Officers not indictable.**—"It is sufficiently settled," continues Mr. Bishop, "that legislators,<sup>3</sup> the judges of our highest courts and of all courts of record acting judicially,"

240; *Commonwealth v. Genther*, 17 S. & R. (Penn.) 185; *People v. Norton*, 7 Barb. (N. Y.) 477; *Anonymous*, Lofft. 185; *Rex v. Seymour*, 7 Mod. 383; *State v. Maberry*, 3 Strob. (S. C.) 144; *Taylor v. Doremus*, 1 Harrison (N. J.) 478; *Stone v. Graves*, 8 Mo. 148 (40 Am. Dec. 181); *State v. Stalcup*, 2 Ire. (N. C.) 80.

<sup>1</sup> Citing *State v. Porter*, 2 Tread. (S. C.) 694; *People v. Coon*, 15 Wend. (N. Y.) 277; *State v. Odell*, 8 Blackf. (Ind.) 896; *Reg. v. Badger*, 6 Jur. 994; *Commonwealth v. Rodes*, 6 B. Mon. (Ky.) 171; *Lining v. Ben-  
tham*, 2 Bay (S. C.) 1; *State v. John-  
son*, *Id.* 835; *State v. Gardner*, 2 Mo. 28; *State v. Glasgow, Cam. & N.* (N. C.) 38 (2 Am. Dec. 629); *Cooper v. Adams*, 2 Blatchf. (Ind.) 294; *People v. Norton*, 7 Barb. (N. Y.) 477; *Rex v. Phelps*, 2 Keny. 570; *Rex v. Okey*, 8 Mod. 45; *Rex v. Allington*, 2 Stra. 678; *Garnett v. Ferrand*, 6 B. & C. 611; *Rex v. Webb*, 1 W. Bl. 19; *Rex v. Halford*, 7 Mod. 198; *Rex v. Sea-  
ford*, 1 W. Bl. 432; *Rex v. Lediard*, Bay. 242; *Cope v. Ramsey*, 2 Heisk. (Tenn.) 197; *Downing v. Herrick*, 47 Me. 462.

In *State v. Glasgow, Cam. & N.* (N. C.) Conf. Rep. 38, 2 Am. Dec.

629, *supra*, it is said: "If a public officer, intrusted with definite powers, to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, although no injurious effect results to an individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizens and of safety to their rights."

<sup>2</sup> Citing *Pratt v. Gardner*, 2 Cush. (Mass.) 68, (48 Am. Dec. 652); *Floyd v. Barker*, 12 Coke 28, 25; *Cunningham v. Bucklin*, 8 Cow. (N. Y.) 178, (18 Am. Dec. 432); *Garnett v. Ferrand*, 6 B. & C. 611; *Tyler v. Alford*, 38 Me. 530; *Furr v. Moss*, 7 Jones, (N. C.) 525; *Kelley v. Dresser*, 11 Allen (Mass.) 81; *Weaver v. Devendorf*, 3 Denio (N. Y.) 117; *Steele v. Dunham*, 26 Wis. 393.

<sup>3</sup> Citing *Story Const. § 795*; 1 Kent Com. 285, note; *Lord Brougham* in *Ferguson v. Kinnoull*, 9 Cl. & F. 251; *Mr. Justice Coleridge*, in *Howard v. Gosset*, May Parl. Law, 2d ed. 151.

<sup>4</sup> Citing 1 Hawk. P. C. Curw. ed.



jurors,<sup>1</sup> and probably such of the high officers of each of the governments as are intrusted with responsible discretionary duties,<sup>2</sup> are not liable to an ordinary criminal process, like an indictment, for official doings however corrupt. There is some apparent authority for including with them justices of the peace, in respect of things judicial, and within their jurisdiction;<sup>3</sup> but the plain weight of authority, probably of reason also, excludes them; holding them liable to the ordinary criminal processes, though not to the civil as we have seen, in cases of corruption, not of mere mistake or error."<sup>4</sup>

§ 1024. *Officer de Facto* liable.—For malfeasance in office the officer *de facto* is liable as though he were *de jure*.<sup>5</sup>

§ 1025. *Liability for particular Offenses*.—A few particular offenses may deserve particular mention in this connection. Thus, the public officer, whether he be such *de jure* or *de facto*,<sup>6</sup> may be punished criminally for—

*Extortion*—which is "the corrupt demanding or receiving,

p. 447, § 6; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; 9 *Id.* 895 (6 Am. Dec. 290); *Cunningham v. Bucklin*, 8 Cow. (N. Y.) 178; *Hamond v. Howell*, 2 Mod. 218; *Floyd v. Barker*, 12 Coke 23, 25.

<sup>1</sup> Citing 1 Hawk. P. C. Curw. ed. p. 447, § 5; *Yates v. Lansing*, 5 Johns. (N. Y.) 282, 293; yet see *Rex v. Bynon*, 2 Show. 302; *Wyld v. Cookman*, Cro. Eliz. 492.

<sup>2</sup> Citing 4 Bl. Com. 121; 2 Woodd. Lect. 355.

<sup>3</sup> Citing *State v. Campbell*, 2 Tyler (Vt.) 177; *Yates v. Lansing*, 2 Johns. (N. Y.) 282; *Floyd v. Barker*, 12 Coke 23, 25.

<sup>4</sup> Citing *Wallace v. Commonwealth*, 2 Va. Cas. 130; *Commonwealth v. Alexander*, 4 Hen. & Munf. (Va.) 522; *Rex v. Borron*, 3 B. & Ald. 432; *Rex v. Harrison*, 1 East. P. C. 382; *Rex v. Seaford*, 1 W. Bl. 432; *Rex v. Smith*, 7 T. R. 80; *Rex v. Fielding*, 2 Bur. 719; *Rex v. Allington*, 1 Stra. 678; *Lord Brougham in Ferguson v.*

*Kinnoull*, 9 Cl. & F. 251, 290; *Rex v. Okey*, 8 Mod. 45; *Rex v. Phelps*, 2 Keny 570; *Rex v. Davis*, Loft. 62; *In re Fentiman*, 4 Nev. & M. 126; *Rex v. Brooke*, 2 T. R. 190; *Rex v. Jones*, 1 Wils. 7; *Rex v. Cozens*, 2 Doug. 426; *Jacobs v. Commonwealth*, 2 Leigh. (Va.) 709; *Rex v. Angell*, Cas. temp. Hardw. 124; *State v. Gardner*, 2 Mo. 23; *Lining v. Bentham*, 2 Bay (S. C.) 1; *People v. Coon*, 15 Wend. (N. Y.) 277; *State v. Porter*, 2 Tread. (S. C.) 694; *Rex v. Justices*, Say. 25; *Rex v. Baylis*, 3 Bur. 1818; *Rex v. Jackson*, Loft. 147; *Rex v. Wykes*, Andr. 288; *Rex v. Harries*, 13 East 270; *Rex v. Bishop*, 5 B. & Ald. 612; *Reg. v. Jones*, 9 Car. & P. 401; *State v. Porter*, 3 Brev. (S. C.) 175.

<sup>5</sup> *State v. McEntyre*, 3 Ired. (N. C.) 171; *State v. Canaler*, 75 N. C. 442; *State v. Long*, 76 N. C. 254; *Kilton v. Fag*, 10 Mod. 288.

<sup>6</sup> *State v. McEntyre*, 3 Ired. (N. C.) 171, 174.

by a person in office, of a fee for services which should be performed gratuitously; or, where compensation is permissible, of a larger fee than the law justifies, or a fee not due;"<sup>1</sup> or, under appropriate statutes, for—

*Embezzlement*—which is the fraudulent appropriation of property by a person to whom it has been intrusted;<sup>2</sup> or for

*Wilful Disregard of Duty*, an offense whose character is sufficiently indicated by its name.<sup>3</sup>

<sup>1</sup> Bishop Crim. Law, § 390, *et seq.*  
Absence of corrupt intent no excuse  
in an action against an officer for a  
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fees: *Cobbey v. Burks*, 11 Neb. 157,  
38 Am. Rep. 364.

<sup>2</sup> *Fortenberry v. State*, 56 Miss. 286;  
*State v. Goss*, 69 Me. 22.

<sup>3</sup> *State v. Kern*, — N. J. —, 17 Atl.  
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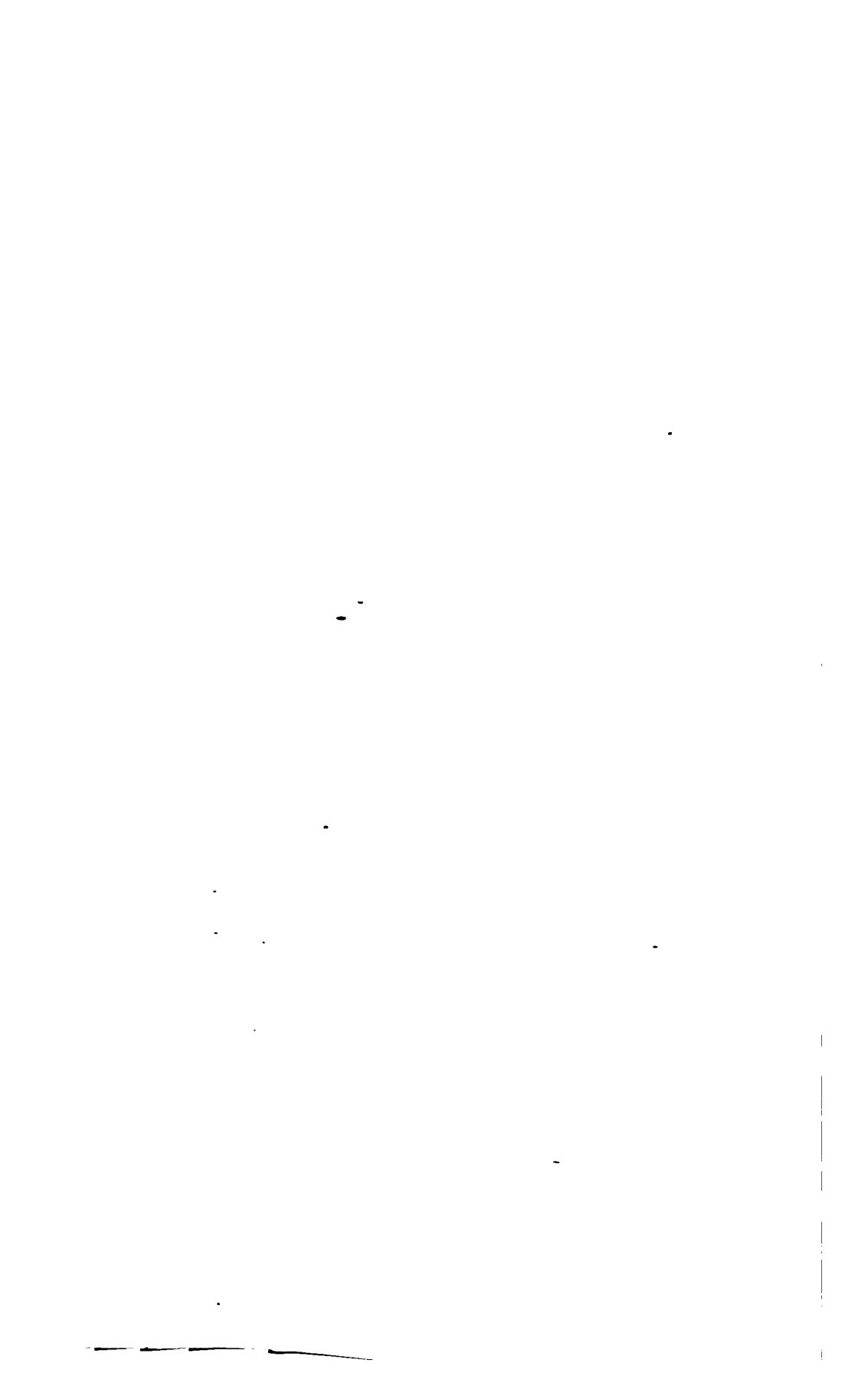
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